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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 622

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VINCENT L. KNEWEL, AS SHERIFF OF MINNEHAHA  
COUNTY, SOUTH DAKOTA, APPELLANT,

vs.

GEORGE W. EGAN

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF SOUTH DAKOTA

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FILED AUGUST 29, 1934

(30,587)

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*vs.*

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[fols. 1 & 2] CITATION—In usual form, showing service on George W. Egan; filed May 17, 1924; omitted in printing

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[fol. 3] CAPTION—Omitted

[fol. 4] **IN UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION**

In the Matter of

GEORGE W. EGAN

vs.

VINCENT L. KNEWEL, as Sheriff of Minnehaha County, South Dakota

PETITION FOR WRIT OF HABEAS CORPUS—Filed December 3, 1923

To the Honorable the District Court of the United States in and for  
the District of South Dakota, Southern Division:

The petitioner respectfully shows the court:

1

That petitioner is a resident of the city of Sioux Falls, Minnehaha County, South Dakota, and of the United States of America.

2

That petitioner is now actually imprisoned and restrained of his liberty in the custody of defendant, Vincent L. Knewel, Sheriff of Minnehaha County above named at the city of Sioux Falls in Minnehaha County and state of South Dakota; that the sole claim and the sole authority by virtue of which the defendant above named so restrains and detains your petitioner of his liberty is a certain paper which purports to be a mittimus issued out of the Circuit Court of Minnehaha County, South Dakota, directing the restraint and imprisonment of your petitioner under and pursuant to a certain judgment of the Circuit Court of Minnehaha County hereinafter more [fol. 5] fully described and referred to.

3

Petitioner states that said mittimus was procured in and rests alone upon the following proceedings:

Petitioner was arrested by the Sheriff of Minnehaha County, South Dakota, on a warrant based upon an Information and placed on trial in the Circuit Court of Minnehaha County, South Dakota, on the

3rd day of April, 1922, on and under the following Information which except for an attached exhibit is in words and figures as follows, to-wit:

"STATE OF SOUTH DAKOTA,  
County of Minnehaha, ss:

In the Circuit Court Thereof, Second Judicial Circuit, May Term,  
A. D. 1920

THE STATE OF SOUTH DAKOTA

vs.

GEORGE W. EGAN, Defendant

Information for the crime of presenting false claim and proof of loss.

"Information

L. E. Waggoner, State's Attorney of the County of Minnehaha, in the Second Judicial Circuit of the State of South Dakota, upon his oath informs the Court:

That the Firemen's Insurance Company of Newark, New Jersey, was at all of the times herein mentioned, a corporation duly organized and existing according to law and engaged in the business of insuring property against accidental loss by fire and as such had fully complied with the laws of the State of South Dakota relative to foreign corporations engaged in such business, and a certificate of authority had been duly issued by the Commissioner of Insurance [fol. 6] of the State of South Dakota stating that the requirements of the law had been complied with and that said company was authorized to do a fire insurance business in the State of South Dakota, and said certificate of authority had been renewed annually and was in full force and effect at all times hereinafter stated, and said company on the 6th day of September, 1919, issued to said George W. Egan its policy of insurance, being a Standard South Dakota policy, by the terms of which a two and one-half story frame building located on Tracts Four (4) and Five (5) of the County Auditor's Subdivision of the Northwest Quarter (N. W.  $\frac{1}{4}$ ) of Section Thirty-two (32), Township One Hundred One (101), Range Forty-nine (49), Minnehaha County, South Dakota, was insured in the amount of Twenty-five Hundred Dollars (\$2,500), for the term of one year from and after September 6, 1919, and thereafter and during the term of the policy so written and on or about November 24, 1919, the said property described in the insurance policy aforesaid was consumed and with the exception of the foundation, completely destroyed by fire; and prior to the time that said building was destroyed the said defendant had procured policies of insurance against like loss or damage by fire, and the Insurance Companies hereinafter named had issued and delivered fire insurance policies to defendant in the amounts with the companies and expiring as follows, namely:

United States Fire Insurance Co., \$2,500, expiring October 31, 1922.

Security Insurance Co., \$2,500, expiring October 28, 1922.

[fol. 7] Rhode Island Insurance Co., \$2,500, expiring October 17, 1922.

Palating Insurance Company, \$5,000, expiring October 17, 1922.

North British & Mercantile Insurance Company, \$5,000, expiring October 13, 1922.

Firemen's Fund Insurance Co., \$2,500, expiring November 5, 1922.

Northwestern National Insurance Co., \$2,500, expiring September 10, 1920.

And also a policy of insurance application for which was given to the United States Underwriters, and the policy for which was executed severally by the United States Fire Insurance and the North River Insurance Company in the amount of \$2,500, and expiring October 27, 1922; said policies aggregating in all the sum of \$27,500 and all covering the same building hereinbefore described.

And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim and proof of loss, a copy of which is hereto attached, marked Exhibit "A" and made a part of this complaint, wherein and whereby the said defendant represented and claimed that said building situated on tracts 4 and 5 of the County Auditor's Subdivision of the Northwest Quarter (N.W. 4) of Section Thirty-two (32), Township One Hundred One [fol. 8] (101), Range Forty-nine (49), Minnehaha County, South Dakota, had been completely destroyed by fire on the 24th day of November, 1919; that the cause of said fire was unknown; that said building was occupied as a residence and summer home; that the value of said building was \$30,000; that said fire did not originate by any act or design or procurement on the part of the said George W. Egan, or in consequence of any fraud or evil practice done, or suffered to be done by said assured; that nothing had been done by or with the said George W. Egan's privity or consent to violate the conditions of said policy of insurance theretofore issued by the Firemen's Insurance Company or to render said policy void; that no articles are mentioned therein but such as were in the building damaged or destroyed, and that no attempt had been made to deceive the company as to the extent of said loss;

Whereas, in truth and in fact, each and all of the said statements in said proof of claim were false and fraudulent, and known to be false and fraudulent by the said defendant at the time they were made, in this: that said building had not been completely destroyed by fire but the foundation and basement remained intact, and the cause of the said fire was at the time known to the said George W. Egan, in that he had caused and procured said fire to be set and started for the purpose and with the intent of destroying said build-

ing; and the said George W. Egan had never occupied the said building as a home or summer residence; nor had the said building "ever been occupied as a home or summer residence by anybody during the [fol. 9] time when the said policy of insurance was in force, but in truth and in fact, the said building had been used as a dancing pavilion and for the storage of household good-; and

Whereas, in truth and in fact, the said building was not of the value of Thirty Thousand Dollars (\$30,000) but was at the time of said insurance, and at the time it was destroyed by fire, of the value of approximately Two Thousand Dollars (\$2,000) lawful money of the United States of America, and the said George W. Egan had intentionally procured all of said fire insurance policies to be issued for the purpose and with the fraudulent intent of collecting from said insurance companies a sum of money greatly in excess of the value of said building; and

Whereas, in truth and in fact, the said fire did originate by the act, design and procurement of the said defendant, George W. Egan; and the said defendant did violate the conditions of said policy by removing a large and material part of said building and by removing the dancing pavilion theretofore insured under said policy and a part of the building so insured; which said dancing pavilion was of the approximate value of Five Hundred Dollars (\$500), lawful money of the United States of America, and the said defendant had theretofore, and during the life of said policy removed a large part of the steam radiators, bath tub and sink; all of which was a part of said building and of the approximate value of \$100 lawful money of the [fol. 10] United States, and had by the removal of said property against the consent and without the knowledge of the said Firemen's Insurance Company, violated the conditions of the policy theretofore issued, and said defendant did conceal from said company the real value of the premises destroyed by fire and did attempt to deceive said company as to the extent of the loss by representing in said proof of claim that the said property was worth approximately Twenty-eight Thousand (\$28,000) Dollars more than its real value, all of which said false and fraudulent claims and proof of loss were made with the intent upon the part of the said George W. Egan to present and use the same in support of the said George W. Egan's claims against the said Firemen's Insurance Company, and the said defendant did thereby and by said means, commit the crime of presenting a false claim and proof of loss upon a contract of insurance contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota.

L. E. Waggoner, State's Attorney in and for Minnehaha County, S. D."

Petitioner says, that the insurance policy referred to in the foregoing information was a standard policy for insurance issued and accepted under the valued policy law of the state of South Dakota; that the property which said insurance policy was written on and which [fol. 11] the insurance covered was totally destroyed; the trial court in its instruction No. 16, stated to the jury:

"It is an established fact that said building was wholly destroyed by fire on or about the 24th day of November, 1919."

## 5

That at the time the case was called for trial and before any other proceedings were had, the transcript of the evidence shows the following:

"Mr. Egan: If the Court Please before anything is started in this case the defendant would like to have the record show as follows: The defendant appears in person and as his attorney Pro se se, and asks permission of the Court to withdraw his plea of Not Guilty for the purpose of interposing another pleading at this time.

Mr. Waggoner: The State objects to the withdrawal of that plea of Not Guilty for the purpose of demurring to the information.

By the Court: Is that the purpose of the motion to withdraw the plea, for the purpose of filing a demurrer?

Mr. Egan: Yes. And I would like to have the record also show this is the first opportunity that has been given the defendant, the trial Judge to preside as Court in this case has just appeared, otherwise he would have filed it earlier. This is the earliest opportunity, and I desire to withdraw the plea of Not Guilty for the purpose of filing a demurrer.

By the Court: I notice in the decision of the case by the Supreme Court on the former appeal that a question relative to the name of [fol. 12] the County was discussed there and the Supreme Court held that because the matter was not raised by demurrer that it was waived.

Mr. Egan: I want the record to show an exception was granted by the Court.

By the Court: I don't believe an exception is necessary under the new rule."

"Mr. Egan: Now at this time before any evidence is received in this case the defendant again appeals to the Court for permission to withdraw his pleas for the purpose of interposing a demurrer.

"Motion denied. Exception allowed. And at this time, before any evidence is offered in this case the defendant makes the following objection of record.

"He objects to the introduction of any testimony under the information in this case because,

1st. The information herein does not substantially conform to the requirements of law as prescribed in Section 4771 of the Revised Code of 1919.

2nd. That more than one offense is charged in said information.

3rd. That said information does not describe a public offense, that no venue is laid and that the Court is without jurisdiction in this case under the information filed herein.

4th. That the information does not state facts sufficient to constitute a public offense under the laws of this State.

[fol. 13] 5th. That the County in which the alleged offense is alleged to have been committed is not stated in said information, and that said information is defective in failing to lay the venue in order to give the court jurisdiction in the premises. Objection overruled. Exception.

## 6

That a trial was then had terminating on the 17th day of April, 1922, of said case and at the conclusion of all the testimony of the State, the State having completely failed to prove the delivery or the mailing by the defendant of the said alleged false proof of loss in Minnehaha County, South Dakota, and the information wholly having failed to allege the name of the county in which the alleged offense was committed, and the Court wholly being without jurisdiction because of the failure of the information to allege jurisdiction and having wholly failed to prove facts sufficient to give the Court jurisdiction the defendant made and there was placed of record the following motion which was overruled by the Court:

"Mr. Egan: Now at this time at the conclusion of the testimony of the State the defendant asks the Court to advise the jury to return a verdict of not guilty on all the grounds stated in the original objection to the introduction in this case:

First. That the information herein does not substantially conform to the requirements of the law as prescribed in Section 4771 of the Revised Code of 1919.

[fol. 14] Second. That more than one offense was charged in the information.

Third. That the information does not describe a public offense.

Fourth. That no venue is laid and that the Court is without jurisdiction in this case under the information filed herein.

Fifth. That the information does not state facts sufficient to constitute a public offense under the laws of this State.

Sixth. That the County in which the alleged offense is alleged to have been committed is not stated in the information, and that said information is defective in failing to lay the venue in order to give the Court jurisdiction.

Seventh. That the State has wholly failed to make out a case against the defendant in the following particulars:

(a) By having failed to prove the venue of the case.

(b) By having failed to prove the delivery of the alleged proof of loss by the defendant to the insurance company.

(c) By having failed to prove any of the elements of the crime charged, having failed to prove a case under the statute as required by the laws of the state (561).

(d) That the State has wholly failed to show any criminal act or criminal conduct on the part of the defendant.

[fol. 15] (e) Has failed totally and completely to show that the defendant ever intentionally or wrongfully made out, executed or caused to be made out, delivered or caused to be delivered any false claim in support of proof of loss as charged in the information.

And that on all these grounds the defendant is entitled to have the jury advised by the Court to return a verdict in his favor."

## 7

That on the 17th day of April, 1922, the jury having found the defendant guilty the Court sentenced defendant to imprisonment in the State of South Dakota Penitentiary for a period of two years and further that the costs of the proceedings be taxed against him by the Clerk.

## 8

That thereafter and immediately and in accordance with the rules of the Court the defendant made, filed and caused to be considered his motion in arrest of judgment as follows:

"(1) That the Court has no jurisdiction of the offense sought to be charged in the information.

(2) The information does not set forth sufficient facts to constitute a criminal offense."

## 9

That thereafter and within the time provided by law defendant perfected his appeal to the Supreme Court of the State of South Dakota and took all and every necessary and proper step required by the law of the State of South Dakota in the presentation of said [fol. 16] case to the Supreme Court of said State; that thereafter and on the 26th day of October, 1923, the Supreme Court affirmed the verdict of the lower Court in a majority opinion; a minority opinion being filed by one of the judges of said Court which two opinions are in words and figures as follows, to-wit:

\* \* \* \* \*

That thereafter on the 14th day of November, 1923, defendant filed his petition for re-hearing with the said Supreme Court of the State of South Dakota, which Petition for re-hearing was denied on November 27, 1923, is in words and figures as follows:

\* \* \* \* \*

That the arrest, detention and confinement of petitioner is unlawful, illegal and contrary to and in violation of the laws of the United States, the Constitution of the United States and the amendments thereto including the 14th Amendment; that it violates the provision of the Constitution of the United States and its Amendments guaranteeing to every citizen due process of law, and it violates that particular provision of the 14th Amendment which forbids any state to pass any law denying to its citizens equal protection of the law.

[fol. 17]

Petitioner avers, that the following definite specific violations of the Constitution and laws of the United States against the rights of petitioner exist and from which and on account of which he asks relief:

(a) The Information under which all proceedings were had and under which defendant was placed on trial did not contain the name of the county in which the alleged offense was supposed to have been committed; therefore, said information was void, and the Court was altogether without jurisdiction.

(b) The record of the case conclusively shows, that no testimony was introduced or received and no proof offered to establish the county in which the alleged offense was committed; that because of this and on this point the Court was wholly without jurisdiction in the premises.

(c) The Court tried petitioner under Section 4271 of the statutes of South Dakota which was of no force and effect under the charge made against petitioner because said statute was superseded by the statutes of South Dakota known as the valued policy law, that because of this the Court was wholly without jurisdiction to try petitioner and his conviction and his present distraint and imprisonment and deprivation of liberty is illegal, unlawful and in violation of the Constitution and laws of the United States.

Petitioner avers that the information upon which all the proceedings [fol. 18] herein described were taken, and upon which the judgment for petitioner's imprisonment and his actual imprisonment depend, did not allege that your petitioner had ever committed any crime within the territorial limits and jurisdiction of the court in which it was filed and in which said proceedings were taken, and that because said complaint contained no such allegations the same was void and a nullity and the court in which it was filed was therefore without any power, jurisdiction or authority to proceed against your petitioner under it, and all the proceedings herein described are, and the imprisonment of your petitioner herein com-

plained of, is, illegal and void because of the lack of such jurisdiction in said court. That your petitioner's said detention is, therefore contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and to the provisions thereof that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## 14

Petitioner avers that he has exhausted all rights, remedies and means in the State Courts of the State of South Dakota, and that he has been unable to protect his rights and liberties as a citizen of the United States; that plain statutes of the state have been disregarded precedent overruled and former decisions held for naught; that the equal protection of the law to every citizen guaranteed by the Constitution with its Amendments, and that due process of law also guaranteed has been denied petitioner; that petitioner is now de-[fol. 19] nied his liberty, violation of the laws of the state of South Dakota and of the Constitution and Amendments thereto of the United States.

## 15

Petitioner alleges that no previous or other application for Writ of Habeas Corpus on the account of his arrest, detention and imprisonment herein complained of has ever been made to any other Court.

Wherefore your petitioner prays that a writ of habeas corpus may issue directed to the said Vincent L. Knewel, Sheriff of Minnehaha County, South Dakota, and to each and all or any of his deputies, requiring him and them to bring and have before this court at a time to be by this court determined, together with the true cause of the detention of your petitioner, and this court may proceed in a summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require.

Dated at the City of Sioux Falls in the County of Minnehaha in the State of South Dakota the 30th day of November, 1923.

Geo. W. Egan, Petitioner.

[fols. 20 & 21] Jurat showing the foregoing was duly sworn to by George W. Egan omitted in printing.

[File endorsement omitted.]

[fols. 22 & 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR WRIT OF HABEAS CORPUS—Filed December 3, 1923

Now on this 1st day of December A. D., 1923, the above matter coming on upon the petition for the issuance of a writ of habeas corpus, it is hereby

Ordered that said writ issue as in said petition prayed, returnable to and before this court at Sioux Falls, So. Dak., at 10 o'clock A. M. of the 10th day of December A. D., 1923; and the petitioner is hereby admitted to bail pending said hearing, in the sum of Three Thousand Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the court may from time to time direct.

By the Court:

Wilbur F. Booth, U. S. Dist. Judge for So. Dakota, by Assignment. (Seal of Court.)

Attest: Dec. 3, 1923. Jerry Carleton, Clerk.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT OF HABEAS CORPUS—Filed December 3, 1923

Whereas George W. Egan has presented to this Court his petition for writ of habeas corpus alleging that he is wrongfully and unlawfully restrained of his liberty by you the said Vincent L. Knewel, as Sheriff of Minnehaha County, South Dakota.

Now, therefore, you the said Vincent L. Knewel are required to produce forthwith before this Court the body of the said George W. Egan, together with the reason and cause why you restrain him of his liberty, in order that the same may be investigated by this Court, and if said petition be sustained, that the said George W. Egan be restored to his liberty.

Let this writ be binding upon your deputies, agents, and servants, as well as upon yourself.

Done at Minneapolis, Minn., this 1st day of December, A. D., 1923.

By the Court:

Wilbur F. Booth, Judge U. S. Dist. Court for District of So. Dakota, by Assignment.

[fol. 25] [File endorsement omitted.]

[fol. 26]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PETITION FOR WRIT OF HABEAS CORPUS—Filed December 26, 1923

Petitioner amends his original petitioner as follows:

## I

Petitioner re-alleges and re-affirms all the allegations of his original petition and restates, adds to and amplifies the same in order to the more fully and clearly present his position and contention to the Court.

## II

Petitioner avers that he is, was and has been for a number of years last past a resident of the city of Sioux Falls, Minnehaha County, South Dakota and within the jurisdiction of this Court; that he is a citizen of the state of South Dakota and of the United States of America; that he has been arbitrarily deprived of his rights and liberties as such citizen of the State of South Dakota and of the United States of America illegally, unlawfully and in direct violation of the constitution and laws of the United States of America, and particularly has he been arbitrarily, illegally and unlawfully deprived of his rights as a citizen, in direct violation of Section "1" of the 14th Amendment to the Constitution of the United States of America; that he has not had due process of law; that he has not had [fol. 27] equal protection of the law, as guaranteed to citizens of the United States of America; that this has occurred in the following manner and under the following conditions:

## III

Petitioner was informed against, arrested and placed on trial in the Circuit Court of the Second Judicial Circuit, Minnehaha County, South Dakota, under the provisions of Section 4271 of the statutes of the State of South Dakota, which section is as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes or subscribes any account, certificate, survey, affidavit, proof of loss, or other book, paper or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state penitentiary not exceeding three years, or by a fine not exceeding one thousand dollars, or both."

That the particular charge made in the information and filed against petitioner under said section numbered 4271, aforesaid, as set forth in the information is:

"That thereafter and on or about the 9th day of January, 1920 the said defendant, George W. Egan, then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse and Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false [fol. 28] and fraudulent claim and proof in support of such claim and proof of loss."

## IV

Petitioner avers that said section numbered 4271, on which the information under which he was tried was based and under which it was drawn was passed and became a law in the State of South Dakota in the year of 1887; that said section numbered 4271 was void, a nullity and unconstitutional and was, at the time that the information based on it was filed and petitioner arrested under it, wholly without any force or effect; that, therefore, the trial court was wholly without jurisdiction in the premises and petitioner was arbitrarily and unlawfully deprived of his rights and liberties as a citizen of the State of South Dakota of the United States of America.

## V

Petitioner avers that he was arbitrarily deprived of his rights and liberties under the said section numbered 4271 under which he was tried and under which and by which all proceedings were had against petitioner; and that all actions on the part of the Court under said section were without jurisdiction, wholly void and a nullity and petitioner's trial and the judgment and the conviction and all proceedings had under said section numbered 4271 were a nullity, void and of no force and effect in the premises, because said section numbered 4271 was superseded, canceled, set aside, modified and held for naught by a later act of the Legislature of the State of South Dakota in the year 1903, when it passed what is known among the statutes of the State of South Dakota as the Valued Policy of [fol. 29] Insurance Law, which law was approved and became effective on the 24th day of February, 1903, said law being in words and figures as follows, to-wit:

"Be it enacted by the Legislature of the State of South Dakota:

"(1) Amount Written Shall be Taken Conclusively to be True Value.—Whenever any policy of insurance shall be written to insure any real property in this state including structures on land owned by another than the insured, against loss by fire, tornado or lightning, and that property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be true value of the property insured, and the true amount of loss and measure of damages.

"(2) When Applicable.—This act shall apply to all policies of insurance hereafter made or written upon real property including

structures situated upon land owned by another than the insured in this state, and also to the renewals which shall hereafter be made, of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

"(3) Court to Allow Attorney's Fees.—The Court upon rendering judgment against an insurance company, upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs.

"(4) Repeal.—All acts and parts of acts in conflict with the foregoing provisions are hereby repealed. This act shall take effect and [fol. 30] be in force from and after its passage and approval.

Approved February 24, 1903."

## VI

That the natural, consequent and legal effect of the passage of the above law referred to by the Legislature of the State of South Dakota in 1903 was to cancel, modify and set aside the statute referred to as section numbered 4271 in such a way and to such an extent that no crime could be charged or predicated upon a proof of loss conforming substantially on the question of value to the amount or value set forth in the contract expressed in the insurance policy; in other words, no crime could be charged or predicated upon a proof of loss on the question of value of the property insured; the statute making the amount of the insurance conclusive proof as to the value of the property in the absence of a showing of criminal fault or fraud on the part of the insured.

## VII

Petitioner avers that he was arbitrarily dealt with and his rights and liberties as a citizen totally disregarded and that the Court that tried him was wholly without jurisdiction in the premises, because the charge against him in the information and the charge under which he was placed on trial and convicted, as set out in paragraph 111 of this Amended Petition, and in order to change the offense sought to be charged by the pleader under section numbered 4271, it would be necessary to allege that the "presentation of the false and fraudulent claim or proof of loss in support of such claim" was upon a contract of insurance for the payment of a loss; that no crime was charged in said information, because it is not, under section numbered 4271 of the statute of South Dakota, made an offense "to present or cause to be presented a false or fraudulent claim or proof of loss in support of such claim" unless it be upon a contract of insurance for the payment of a loss; hence, no crime was charged in the information and the Court was wholly without jurisdiction in the premises, the verdict of the jury, the entry of the judgment and all proceedings in the premises were a nullity and the defendant arbitrarily, illegally and unlawfully deprived of his rights and liberties as a citizen.

## VIII

Petitioner avers that he was arbitrarily dealt with and his rights and liberties as a citizen totally disregarded and the Court was wholly without jurisdiction, further because the charge against him sought to be made in the information quoted in paragraph "111" of this Amended Petition required proof against petitioner of two distinct and definite facts:

(a) That the claim on which his proof of loss was based was a false and fraudulent claim;

(b) That the proof of loss was false or fraudulent and based upon a false or fraudulent claim against an insurance company for payment of a loss.

## IX

That the Court was without jurisdiction in the premises and petitioner was arbitrarily deprived of his rights and liberties as a citizen because his claim against the insurance company was a perfectly good and valid claim and the record of the case showed it to be such, yet petitioner was convicted on the charge of presenting a false proof of loss in support of a claim when the claim on which it was based was a perfectly valid claim; that no fraud was charged [fol. 32] or proven against petitioner; that the insurance agents of the insurance company testified in behalf of petitioner that he had in no wise deceived them and that he had perpetrated no fraud against the insurance company in securing the insurance.

## X

Petitioner was arbitrarily deprived of his rights and liberties as a citizen of the State of South Dakota and of the United States of America, further, in that he was placed on trial on and under a charge in an information which showed on its face affirmatively that the Court was wholly without jurisdiction in the premises; the information did not state facts sufficient to give the Court jurisdiction, but in truth and in fact said information showed by a fair reading that the Court was wholly without jurisdiction; that the place in which the alleged offense was supposed to have been committed with which petitioner was charged, is not set forth or stated as being within the jurisdiction of the trial court; that on this question the information says:

"\* \* \* and that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim and proof of loss."

That in truth and in fact the above is a fair and clear charge that the presentation of the "false and fraudulent claim", if presented at all, was presented at Newark, New Jersey, and not elsewhere; that [fol. 33] nowhere in said information was the "County of Minnehaha in the State of South Dakota" set forth or alleged to be the place where the alleged act charged against petitioner was committed.

## XI

That at the proper time and place petitioner objected and protested and made his objection specific in the record to the introduction of any testimony for the reasons and upon the grounds set forth from the official record in petitioner's original petition filed herein; that petitioner's rights as a citizen were arbitrarily denied to him and his objections swept aside, and the Court, although without jurisdiction in the premises, proceeded against him.

## XII

Petitioner at the conclusion of all the testimony offered by the state, the state having wholly failed to prove or introduce any competent testimony of the commission of the offense charged or of any offense by petitioner in Minnehaha County, South Dakota, made a definite, specific and proper objection of record, which objection copied from the record is set forth in petitioner's original petition; that these objections were disregarded and petitioner arbitrarily deprived of his rights and liberties as a citizen by a court which was wholly without jurisdiction in the premises for the reasons herein and hereinbefore specifically stated to the Court.

## XIII

That at the conclusion of all of the testimony, both on the part of the state and on the part of petitioner, petitioner renewed and set forth definitely and specifically the objections and exceptions which are set out in full from the record in his original petition [fol. 34] herein filed; that without due process of law, arbitrarily and in total disregard of the rights and liberties of petitioner as a citizen, his objections were wholly disregarded, overruled and set aside and in the manner herein set out and because of the facts herein set forth, and set forth in petitioner's original petition, and because of the facts narrated to the Court in his petition and this amended petition, petitioner has been summarily deprived of his rights and liberties as a citizen of the state of South Dakota and of the United States of America, in violation of the constitution and laws of the United States of America, and there has been denied to petitioner due process of law and equal protection of the laws by the state of South Dakota.

Wherefore, on account of which and by reason of which petitioner renews the prayer of his original petition and prays the relief

therein sought, and such other and further relief as to the conscience of the Court may seem just and right in the premises.

Geo. W. Egan, Petitioner.

Jurat showing the foregoing was duly sworn to by George W. Egan omitted in printing.

[fol. 35] [File endorsement omitted.]

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[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS—Filed January 3, 1924

Comes Vincent L. Knewel, sheriff of Minnehaha County, South Dakota, and for his return to the writ of habeas corpus issued herein alleges:

## I

Said Vincent L. Knewel will refer to himself as the Respondent herein. Respondent alleges that at all times since the petition for the writ in this proceeding was filed, he has been and now is the duly elected, qualified and acting sheriff of Minnehaha County, South Dakota. Respondent states that at the time the writ of habeas corpus issued in this proceeding was presented to and served upon him, he was holding the petitioner in his custody and by virtue of a certain certified copy of a judgment rendered in the circuit court of the State of South Dakota in and for Minnehaha County, which certified copy of the judgment had been placed in his hands for the purpose of making execution thereof by the Clerk of Courts of said Minnehaha County. A true copy of the certified copy of said judgment is marked Exhibit "A" and is annexed hereto and is made a part of this return. That under the laws of the State of South [fol. 37] Dakota, it was the duty of the Respondent on receiving a certified copy of a judgment in a criminal cause whereby a person has been found guilty of a felony to forthwith take and deliver the defendant to the warden of the state penitentiary. That the petitioner herein, George W. Egan, was the defendant named in said judgment, and Respondent had taken said petitioner into his custody at the time such writ of habeas corpus was presented to him for the purpose of delivering him to the warden of the state penitentiary at Sioux Falls.

## II

Respondent further alleges that the circuit court in the State of South Dakota has exclusive, original and general jurisdiction to try and determine all cases for violations of and offenses against the laws of such state where the penalty provided is imprisonment in the

state penitentiary. That such cases are known under the laws of this state as felonies. That the petitioner was duly prosecuted in the circuit court of the State of South Dakota in and for Minnehaha County for a felony. That the laws and statutes upon which such prosecution was based are not in themselves repugnant to the federal Constitution and that said prosecution was conducted according to the settled course of judicial proceedings as established by the laws of the State of South Dakota, and that said proceedings included due notice to the petitioner at all stages thereof, and opportunity was offered the petitioner at every step of the trial for a hearing on every question raised.

### III

That on the 10th day of May, 1920, an information, verified [fol. 38] by the State's Attorney of Minnehaha County, South Dakota, was duly presented and filed against the petitioner as a defendant in the circuit court of the State of South Dakota in and for said Minnehaha County. Respondent admits upon information and belief that the copy of the information set out in paragraph 3 of the petition herein for writ of habeas corpus is a true copy of such information so filed and presented, with the exception that the Exhibit "A" attached to and made a part of such information is not included in said petition. That said Exhibit "A" showed upon its face that it was subscribed and sworn to by the said petitioner at Sioux Falls in Minnehaha County, South Dakota. Said petitioner, as defendant in such action, appeared before the said circuit court in Minnehaha County on May 10th, 1920, and was duly arraigned and entered a plea of not guilty to such information. That said petitioner did not demur to such information or enter or file any other pleading to such information than his plea of not guilty thereto. That a trial was thereupon had upon the issues presented by such information, and the plea of not guilty of the petitioner thereto, starting on the 18th day of May, 1920, and continuing from day to day until the 28th day of May, 1920, upon which last date the jury impaneled to try said cause returned a verdict of guilty against the defendant. That said verdict was duly entered by the court in said cause, and thereupon the petitioner made a motion in arrest of Judgment upon the following grounds:

First. Because the court has no jurisdiction over the offense sought to be charged in the information.

[fol. 39] Second. Because the information does not set forth sufficient facts to constitute a criminal offense.

On the 7th day of December, 1920, the court overruled the motion of the petitioner in arrest of judgment by a written order entered on such date. The defendant thereupon made a motion for a new trial upon the following grounds, among others:

"Fifth. And on the further ground and for the further reason that the defendant did not have due process of law, and was denied

due process of law in violation of Articles 5 and 6 of the amendments to the Constitution of the United States in the following particulars:

"(a) That the defendant was not advised by the information of the district, county and state wherein the alleged offense was committed.

"(b) Because at the trial of said cause it was not proved the district or county and state in which the alleged offense was committed."

On the 7th day of December, 1920, the court made its order overruling and denying the motion of the petitioner for a new trial.

On the 14th day of December, 1920, the said circuit court entered judgment against the petitioner imposing upon the petitioner a sentence of two years in the penitentiary of the state.

Thereupon, on January 12th, 1921, said petitioner appealed from said judgment to the Supreme Court of the State of South Dakota, and said appeal was duly heard by such Supreme Court. That by [fol. 40] the decision and opinion of the Supreme Court upon such appeal, found reported in 44 S. D. Rep., page 273, it was found and declared that such information stated facts which constituted a criminal offense, and that it did not appear on the fact of the information that the trial court did not have jurisdiction, and that the petitioner, having failed to demur to the information, could not object to the court proceeding upon the information under his plea of not guilty. The judgment and sentence of the trial court was reversed and set aside by the Supreme Court upon such appeal upon other grounds, and a new trial ordered.

#### IV

On April 3d, 1922, a new trial of said cause was regularly begun and continued up to and including the 15th day of April, 1922, at which time the jury duly impaneled to try said cause brought in a verdict of guilty against the petitioner. On April 17th, 1922, the petitioner again made a motion in arrest of judgment, which was denied by an order of the court. The petitioner thereupon made application for an order granting a new trial, which application was later denied by the court. On the 17th day of April, 1922, the court entered its judgment in said cause against the petitioner, a copy of which has been heretofore referred to and is annexed hereto as Exhibit "A."

Thereafter said petitioner took an appeal to the Supreme Court of the State of South Dakota from the order denying him a new trial, and from the judgment of the said circuit court. Said appeal was in all respects duly heard by the Supreme Court, and thereafter, on October 26th, 1923, the said Supreme Court rendered its decision [fol. 41] whereby the order of the circuit court refusing to grant petitioner a new trial and the judgment and sentence of said court against said petitioner was in all things affirmed. Petitioner has copied into his petition herein the opinion of the Supreme Court made upon such appeal.

## V

All of the above steps in the trial of said cause were regularly and duly heard before state courts of competent jurisdiction. That the only purpose and effect of the petition filed herein is to attempt to point out errors in matters of law alleged to have been committed by the circuit court of the State of South Dakota in the exercise of its jurisdiction over said cause. That said petitioner, by the filing of his petition for a writ of habeas corpus in this court, is attempting to employ the writ of habeas corpus as a substitute for a writ of error.

## VI

Respondent denies that the information filed against the petitioner in said criminal action shows upon its face that said circuit court did not have jurisdiction to hear and determine said cause. Respondent alleges that this contention was made by petitioner through two trials of said cause before the said circuit court of South Dakota for Minnehaha County, and that said circuit court, as a court of general and competent jurisdiction, has twice found and determined against this contention of the petitioner. That said petitioner has twice appealed to the Supreme Court of the State of South Dakota to review the de-[fol. 42] termination of the circuit court upon said contention, and in each of said appeals the said Supreme Court has found against the contention of the petitioner. Respondent denies that the said information did not show that the false and fraudulent claim or proof of loss described therein was presented upon a contract of insurance for the payment of a loss. Alleges, on the contrary, that said information showed affirmatively upon its face that said alleged false and fraudulent claim was presented upon a contract of insurance for the payment of a loss.

## VII

Petitioner denies that Section 4271 of the Revised Code of South Dakota 1919 was in any way superseded, cancelled, set aside, modified, or repealed by an act of the legislature of the State of South Dakota in 1903, or at all. Respondent denies that said Section 4271 was for any reason void, invalid or unconstitutional or not in force and effect at the time of the commission of the crime charged. Respondent alleges that said Section 4271 was enacted by the legislature of the State of South Dakota in the year 1919 as a part of Chapter 300 of the acts of the legislature of that year, said act being approved on the 23d day of January, 1919, and went into effect on the 1st day of July, 1919. Respondent denies that said Section 4271 of the South Dakota Revised Code of 1919, and the information filed against petitioner under said statute, should be construed as claimed by him in paragraphs 8 and 9 of his amended petition. Respondent alleges that the validity and the construction of said statute, and of said information, are all matters which said petitioner submitted to [fol. 43] the circuit court of the State of South Dakota for Minnehaha County in the trial of said criminal cause, and all of said coa-

tentions were determined against the contentions of said petitioner, and said petitioner is concluded thereby.

### VIII

Respondent denies that the state failed to prove in the trial of said criminal cause, or that it failed to introduce competent testimony of the commission of an offense by petitioner within Minnehaha County, South Dakota. Respondent alleges that at the trial of said cause, both the state and the petitioner introduced evidence, and that such evidence is duly considered by the court, and that the petitioner made the same contention before said circuit court at the trial of said cause and upon his appeal to the Supreme Court—that evidence had not been introduced to show the commission of a crime by petitioner in Minnehaha County, South Dakota; and that the said circuit court, as a court of competent and general jurisdiction, found against the contentions of the petitioner, and that the Supreme Court of the State of South Dakota, upon the appeal of petitioner, likewise found against his contention in this respect, and that said petitioner is concluded thereby.

Respondent therefore asks that petitioner be denied his release under said writ of habeas corpus, and that he be remanded to the custody of Respondent for the execution of the judgment of the circuit court of South Dakota for Minnehaha County.

Vincent Knewel, Respondent.

[fol. 44] Jurat showing the foregoing was duly sworn to by Vincent L. Knewel omitted in printing.

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### EXHIBIT A

STATE OF SOUTH DAKOTA,  
County of Minnehaha, ss:

IN THE CIRCUIT COURT THEREOF, SECOND JUDICIAL CIRCUIT

At a regular term of the Circuit Court within and for the Judicial Subdivision of the County of Minnehaha, in the Second Judicial Circuit of the State of South Dakota, held at the Court house in the city of Sioux Falls, in said County and Circuit, on the 17th day of April, A. D. 1922.

Present: The Hon. James McNenny, Presiding Judge, and the officers of said Court.

## THE STATE OF SOUTH DAKOTA

vs.

GEORGE W. EGAN

## Judgment

[fol. 45] An information having been duly filed in said Court by the State's Attorney of the Judicial Subdivision of Minnehaha County, on the 10th day of May, A. D. 1920, charging said defendant with the crime of presenting false claim and proof of loss, and said defendant being duly arraigned upon the said Information on the 10th day of May, A. D. 1920, Jones, Muller & Conway, esqs. appearing as counsel for said defendant upon such arraignment, duly entered in open Court his oral plea of Not Guilty of the charge in said Information contained; and said cause having been regularly brought on for trial upon the issue joined therein George W. Egan, Esq., appearing as counsel for himself and L. E. Waggoner State's Attorney, appearing for the prosecution, before the Court and a Jury duly sworn and legally impanelled and sworn to try said cause on the 6th day of April, A. D. 1922; and the jury having heard the evidence adduced on behalf of the State of South Dakota, and on behalf of said defendant on the 15th day of April, A. D. 1922, returned into open Court, in the presence of said defendant their oral verdict "Guilty of presenting false claim and proof of loss to an insurance company as charged in the information, and thereupon the Court appointed the 17th day of April, A. D. 1922, as the time for pronouncing judgment. And now April 17th, A. D. 1922, being the time appointed for judgment herein, the said defendant appearing for judgment; and thereupon the said defendant was informed by the Court of the nature of the Information of his plea, and the verdict therein, and was asked by the Court whether he had any legal cause to show why judgment should not be pronounced [fol. 46] against him; and no sufficient cause being alleged or appearing to the Court why judgment should not be pronounced, the court thereupon pronounced the following judgment and

## Sentence

And now, April 17th, A. D. 1922, the Court being fully advised in the premises, it is by the Court considered, ordered and adjudged, that you George W. Egan be imprisoned in the State Penitentiary, situated in Sioux Falls, County of Minnehaha, and State of South Dakota, at hard labor, for the full term and period of two years, there to be kept, fed and clothed, according to the rules and discipline governing said penitentiary. And that defendant pay all the costs of this proceeding to be taxed by the Clerk of this Court upon the same notice as in Civil cases. And it is further ordered that you stand committed to the custody to the Sheriff of Minnehaha County, pending the execution of this judgment.

Done in open Court.

By the Court.

James McNenny, Judge.

Attest: Odean Hareid, Clerk. (Seal.)

Filed Apr. 17, 1922. Minnehaha County, S. D. Odein Hareid, Clerk Circuit Court. State of South Dakota, County of Minnehaha.

[fol. 47] I, Eugene I. Foster Clerk of the Circuit Court, within and for the County of Minnehaha, State of South Dakota, and keeper of the records and files thereof, do hereby certify the annexed and foregoing to be a true and correct copy of judgment in the matter of the State of South Dakota vs. George W. Egan.

And I further certify that I have compared the same with the original on file in my office and that the same is a full, true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at my office in the City of Sioux Falls in said County, this 17th day of December, A. D. 1923.

Eugene I. Foster, Clerk of the Circuit Court, by ———, Deputy. (Seal of Court.)

[File endorsement omitted.]

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[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO RESPONDENT'S RETURN—Filed January 3, 1924

To the Honorable Albert L. Reeves, Presiding Judge:

#### Division I

The petitioner herein, George W. Egan, for answer and reply to the return of a writ of habeas corpus filed herein by Vincent L. Knewel as Sheriff of Minnehaha County, South Dakota, states that he hereby and herewith realleges and restates each and every averment and allegation contained and set forth in his petition and amendments thereto filed and presented in this cause with the same force and effect as though the same were set forth verbatim in this reply.

#### Division II

Further replying to and answering said return, this petitioner states that the information upon which he has been convicted in the Circuit Court of Minnehaha County, South Dakota, and upon which conviction he had been restrained of his liberty, as shown by his petition and return to said writ of habeas corpus, did not charge or accuse this petitioner with presenting or causing to be presented any [fol. 49] false or fraudulent claim or any proof in support of any such claim upon any contract of insurance for the payment of any

loss; and that said complaint does not charge or accuse this petitioner with the violation of any penal statute of the State of South Dakota.

Said petitioner further states that the Circuit Court of Minnehaha County, South Dakota, in which court this petitioner was convicted, as aforesaid, never had any jurisdiction to try, convict or sentence to prison this petitioner, because it had no jurisdiction of the subject matter of said trial by reason of the fact that said information did not charge or accuse this petitioner of the violation of any penal statute of the State of South Dakota.

That said Circuit Court did not have jurisdiction to try, convict or condemn this petitioner in said proceeding for the reason that said information was a void information under the Constitution, statutes and decisions of the Supreme Court of the State of South Dakota, for the reason that said information did not allege or charge that the said complainant, in Minnehaha County, South Dakota, or within the territorial jurisdiction of the Circuit Court of Minnehaha County, South Dakota, violated any penal statute of the State of South Dakota.

The petitioner further states in answer and reply to said return to the writ of habeas corpus that said Circuit Court of Minnehaha County, South Dakota, did not have jurisdiction to try, convict and condemn this petitioner for the further reason that nowhere did it appear, no evidence was adduced upon the trial of said cause in said Circuit Court of Minnehaha County, South Dakota, that the [fol. 50] alleged and pretended criminal act on the part of the said petitioner was committed within the territorial jurisdiction of the Circuit Court of Minnehaha County, South Dakota.

As another, further, different and complete answer and reply to said return to said writ of habeas corpus, this petitioner avers that Section 4271 of the Revised Code of 1919 of the State of South Dakota is void, inoperative and repealed by Code Section 9201 of the Revised Code of 1919 of the State of South Dakota.

Wherefore, this petitioner prays that he may be forthwith discharged from all custody and restraint; that he may be granted his freedom and liberty; and that his bond given herein may be exonerated.

Geo. W. Egan, Petitioner. Kirby, Kirby & Kirby, W. G. Rice & Robert Healy, Counsel for Petitioner.

Jurat showing the foregoing was duly sworn to by George W. Egan omitted in printing.

[fols. 51-58] [File endorsement omitted.]

[fol. 59] IN UNITED STATES DISTRICT COURT

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA, APRIL  
TERM, A. D. 1923

STATE OF SOUTH DAKOTA, Plaintiff and Respondent,

vs.

GEORGE W. EGAN, Defendant and Appellant

**Petitioner's Exhibit**—Filed Jan. 3, 1924

APPELLANT'S BRIEF

Part One

On the 10th day of May, 1920, information verified by the State's [fol. 60] Attorney of Minnehaha County, South Dakota, was presented and filed against the defendant in the Circuit Court of Minnehaha County, all of the material parts of which information are as follows:

[fol. 61] PROOF OF LOSS

Policy No. 12.

Amount of Policy, \$2,500.

Firemen's Insurance Company of Newark, New Jersey

By your policy of Insurance No. 12, issued at your Sioux Falls Agency, dated the 5th day of September, 1919, and expiring the 6th day of September, 1920, at 12:00 noon, you insured Geo. W. Egan against loss or damage by fire, to the amount of Twenty-five Hundred (\$2,500) Dollars according to the terms and conditions printed therein; the written portion and all endorsements, transfers and assignments being as follows:

South Dakota Standard Dwelling and Household Furniture

Form No. 49

On the following described property, all situated on tracts 4 and 5 of County Auditor's Subdivision of the N. W.  $\frac{1}{4}$  of Section 32, Township 101, Range 49, State of South Dakota:

\$2,500.00, on the 2½ story shingle roof frame building including foundations, plumbing, electric wiring and stationary heating, light- [fol. 62] ing and ventilating apparatus and fixtures therein; awnings, door and window screens and storm doors and windows. Also all permanent fixtures belonging to and constituting a part of said building; occupied and to be occupied only for dwelling purposes.

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(Whenever figures appear in ( ) they refer unless otherwise stated to the page of the settled record.)

If the building hereby insured is occupied by tenants, this insurance shall also cover under this item, if the property of the owner of building and not otherwise insured, floor coverings, mirrors, stove, refrigerators, cleaning apparatus, hose and other fire extinguishing appliances, fuel, janitor's tools and implements, all constituting a part of the equipment and service of the building and only while contained in or attached to the above described building.

Other concurrent insurance hereby permitted.

(Regular standard form.

Schedule "B" attached hereto, contains a complete list of all policies held by me at the time of the fire, covering the property herein described. Full copies of the written portions thereof will be furnished on demand.

The property described in said policy belonged, at the time of the fire hereinafter mentioned to Geo. W. Egan, and no other person or persons had any interest therein, except as mentioned below.

If the loss is on building, state whether real estate is owned in fee simple or held on lease, fee simple.

State the nature and amount of incumbrance at the time of the fire. Twenty-three Hundred (\$2,300.00) Dollars.

The building described, or containing the property described in said policy, was occupied at the time of the fire as follows:

First floor. Dwelling.

Second floor. Unoccupied.

Third floor. Unoccupied.

A fire occurred on the 24th day of November, 1919, about the hour of 11 o'clock p. m. by which the property described by said policy of insurance and situate as therein named was destroyed or damaged, as hereinafter set forth in detail, said fire originating as follows: Unknown.

The actual cash value of each specific subject thus situated and described by the aforesaid policy at the time of loss, and the actual loss and damage by said fire to same, as shown by the annexed schedule [fol. 64] rule, and for which claim is hereby made, were as follows:

#### 1st Item of Policy

Sound value, \$30,000; total loss, \$30,000; total ins., \$27,500; amt., \$2,500; named claim in policy, \$2,500; total amount claimed of this Company under above named policy, \$2,500.

(For a detailed statement of value and loss, see schedule herewith which is made a part of this proof of loss.)

At the time said insurance was affected, the property described by said policy belonging to Geo. W. Egan and the said fire did not originate by any act, design or procurement on the part of the assured, or this affiant, or in consequence of any fraud or evil practice done or suffered by said assured, this affiant; nothing has been done by or with the assured or this affiant's privity or consent to violate the conditions of the policy, or render it void; no articles are mentioned herein but such as were in the building damaged

or destroyed, and belonging to, and in possession of, the said assured at the time of said fire; no property saved has been in any manner [fol. 65] concealed, and no attempt to deceive the said Company, as to the extent of said loss has in any manner been made.

Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is expressly stipulated that there has been no waiver of any of the rights or defenses of this Company by the furnishing of this "Proof of Loss" blank to the assured, or making up of proofs by an adjuster, or any agent of the Company or Companies named herein, or in any other way whatever.

The insured says he is born at —, and that he is a citizen of the United States (if foreign born fill out following) having been duly naturalized by the — Court of — County, State of —, on the — day of —, —.

Witness my hand at Sioux Falls, South Dakota, this 9th day of January, 1920.

(Signed) Geo. W. Egan.

STATE OF SOUTH DAKOTA,

County of Minnehaha, ss:

Sioux Falls, S. D., Jan. 9, 1920.

Personally appeared Geo. W. Egan signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of. [fol. 66] Subscribed and sworn to before me, the day and date above written. H. R. Whitehouse, Notary Public, S. D.  
(Seal.)

1. Building 40 x 60 ft. on ground.
2. Full basement with partitions, all built of Sioux Falls granite.
3. It is generally known that the fire destroys Sioux Falls granite.
4. It will be necessary to replace foundations and cross walls.
5. Estimated cost of this item under present prices and conditions \$5,000.00.
6. Expense of cleaning up basement, \$100.00.
7. Building contained twenty-two rooms, all finished in first-class shape.
8. Ceilings of first floor, 14 ft. Second floor, 12 ft. Third floor, 10 ft.
9. Building contained 86,400 cu. ft.
10. Cost of rebuilding under present prices and conditions and transporting of material to grounds, estimated 35c per cu. ft.
11. Estimating total cost of rebuilding building \$30,240.00.
12. Estimated cost of rebuilding foundation, \$5,000.00, plus [fol. 67] estimated cost of piping for steam as building was piped, \$1,500.00.
13. Estimated total cost to replace building as it was when destroyed, \$37,140.00.

14. Have submitted statement of Construction Company showing estimated \$27,800.00 without reference to rebuilding foundation, or repiping for steam heating.

(Signed) Geo. W. Egan.

Name of company	Amount	Total claim	No. of policy	Date of exp.
U. S. Fire Ins. Co.....	\$2,500.00	\$2,500.00	40423	10-31-22
Sec. Ins. Co.....	3,250.00	3,250.00	16820	10-28-22
Firemen's Ins. Co.....	2,500.00	2,500.00	12	9- 6-20
U. S. Underwriters.....	2,500.00	2,500.00	40029	10-27-22
Rhode Island Ins. Co.....	2,500.00	2,500.00	530032	10-17-22
Palatine Ins. Co.....	5,000.00	5,000.00	70176	10-17-22
N. Brit. & Merc. Ins. Co.....	5,000.00	5,000.00	3586363	10-13-22
Firemen's Fund Ins. Co.....	2,500.00	2,500.00	959348	11- 5-22
Northwestern Nat'l Ins. Co....	2,500.00	2,500.00	6394	9-10-20

[fol. 68] (Endorsed on back: "Presented in open court by the State's Attorney and filed as a record of the court this 10th day of May, 1920. Odean Hareid, Clerk. L. E. Waggoner, State's Attorney, Minnehaha County, South Dakota.")

#### PLEA OF NOT GUILTY

Defendant was duly arraigned, and thereupon entered his plea of not guilty (1599).

#### TRIAL (237-1104)

Thereupon and on the 3rd day of April, 1922, before the Honorable James McNenny acting instead of the Honorable John T. Medin, a jury was impanelled and the following proceedings were had:

#### ARGUMENT OF COUNSEL

Defendant appeared as his own attorney and asked the Court for permission to withdraw his plea of not guilty for the purpose of interposing another pleading as follows (237):

Mr. Egan: "If the Court please, before anything is started in this case, the defendant would like to have the record show as follows: The defendant appears in person and as his attorney Pro se se, and asks permission of the Court to withdraw his plea of Not Guilty for the purpose of interposing another pleading at this time."

Mr. Waggoner: "The State objects to the withdrawal of that plea of Not Guilty for the purpose of demurring to the information. [fol. 69] This matter has been up and thrashed over by the Supreme Court and it certainly would be no useful purpose in permitting the withdrawal of the plea "Not Guilty" and filing a demurrer to the information. It seems to me that the information has been held good

by reason of the fact that the defendant has already waived his objection to it and that waiver ought to stand."

By the Court: "Is that the purpose of the motion to withdraw the plea, for the purpose of filing a demurrer?"

Mr. Egan: "Yes. And I would like to have the record also show this is the first opportunity that has been given the defendant, the trial Judge to preside as Court in this case has just appeared, otherwise he would have filed it earlier. This is the earliest opportunity, and I desire to withdraw the plea of Not Guilty for the purpose of filing a demurrer, and certain it is that if as the State has said it has been passed on no prejudice could come to them, the prejudice might come to the defendant if the Court should exercise his discretion against him at this time" (237).

By the Court: "I notice in the decision of the case by the Supreme Court on the former appeal that a question relative to the name of the County was discussed there, and the Supreme Court held that because the matter was not raised by demurrer that it was waived. [fol. 70] I don't believe that the Court would be warranted in granting a motion to withdraw the plea at this time for the purpose of setting up that proposition. It seems to me that that is quite technical and couldn't possibly mislead anyone, and I don't think the Court would be warranted in putting the people to the expense that would be incident to changing the plea. The motion will therefore be denied" (238).

State offers in evidence Exhibit "1." (This Exhibit is as follows: Copy of certificate of authority issued by the Insurance Commissioner of the State of South Dakota to the Firemen's Insurance Company of Newark (1426), New Jersey, on the 1st day of March, 1919.)

Mr. Egan: "Now at this time before any evidence is received in this case the defendant again appeals to the Court for permission to withdraw his pleas for the purpose of interposing a demurrer."

Motion denied. Exception allowed.

Now at this time before any evidence is offered in this case the defendant makes the following objection of record.

He objects to the introduction of any testimony under the information in this case because, 1st—The information herein does not substantially conform to the requirements of law as prescribed [fol. 71] in Section 4771 of the Revised Code of 1919. 2nd—That more than one offense is charged in said information. 3rd—That said information does not describe a public offense, that no venue is laid and that the Court is without jurisdiction in this case under the information filed herein. 4th—That the information does not state facts sufficient to constitute a public offense under the laws of this state. 5th—That the County in which the alleged offense is alleged to have been committed is not stated in said (244) information, and that said information is defective in failing to lay the venue in order to give the Court jurisdiction in the premises. Objection overruled. Exception allowed.

And now to the State's Exhibit No. "1" the defendant excepts and objects for the reason that the same is irrelevant, incompetent, im-

material, hearsay, secondary, no proper foundation is laid; and the information in this case is defective as stated in the grounds stated above. Overruled. Admitted (245).

State offers in evidence Exhibit "2." (This Exhibit is as follows: Certified copy of Articles of Incorporation of the Firemen's Insurance Company of Newark, New Jersey) (1271).

To the State's proposed Exhibit "2" defendant objects on the ground that it is incompetent, irrelevant, immaterial and hearsay, [fol. 72] and no proper foundation laid, and the informations is defective under which this case is now being tried.

Overruled. Exception allowed. Exhibit admitted.

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H. R. WHITEHOUSE, produced by the State, testified as follows: (245) "I live in Sioux Falls, and am connected with the F. C. Whitehouse and Company Agency. We are agents for the Firemen's Security and Rhode Island Insurance Company (246) On the 6th day of September, 1920, our Agency issued a policy in the Firemen's Insurance Company to the defendant. It was a standard South Dakota policy. (246) It was written and delivered to the defendant."

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ODEAN HAREID, produced by the prosecution, testified: (248 "I am Clerk of Courts of Minnehaha County, South Dakota, Exhibit "3" is part of my office files in the case of State of South Dakota against Geo. W. Egan. Exhibit "3" was made under my supervision and direction and was copied from Exhibit "D" in the other case. Exhibit "D" being the fire insurance policy of the Firemen's Insurance Company of Newark, New Jersey. (249) There was a stipulation between attorneys that a copy be substituted for this Exhibit [fol. 73] "D" and under such stipulation I made Exhibit "3." (250) Exhibits "4," "5," "6," "7," "8," "9," "10" and "11," and other Exhibits that are covered by the same stipulation and those Exhibits "4" to "11" are copies which were made in the same way as Exhibit "3." The originals were returned to Mr. Egan. Those Exhibits have been part of the files in the case of State against Egan since the time they were made." (251)

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H. R. WHITEHOUSE, re-called on behalf of the State testified: (252) "I testified on the trial of this case before. At that time I saw the original policy issued by the Firemen's Insurance Company to Mr. Egan. I don't remember the description of the property covered by the policy. (253) The amount was twenty-five hundred dollars. (254) The Fireman's Insurance Company of Newark, New Jersey, issued only one policy to Mr. Egan covering the Al Fresco Park property under date of September 6, 1919. I saw the policy at the last trial down here." (255)

L. E. WAGGONER, State's Attorney, testified for the prosecution, as follows: "I am the State's Attorney of Minnehaha County and was present at the former trial of this case. (256) Two insurance policies were shown Mr. Whitehouse on the last trial, he was a witness. One of them was a policy of the Fireman's Insurance Company of Newark, New Jersey. At that time the policy was given to the Clerk [fol. 74] of Courts. I saw this policy after the trial of the action, (257) in the Clerk's office. A copy of that policy was made by Ruby DeLap. (258) Exhibit "3" is the copy that was made by Miss DeLap. This copy was delivered to Clerk of Courts. (259) The number of the original policy of the Firemen's Insurance Company of Newark, New Jersey, from which Exhibit "3" was copied, was Exhibit "D," in the former trial." (260)

State offers in evidence Exhibit "3." This Exhibit is as follows: (Copy of insurance policy issued to the defendant by the Firemen's Insurance Company of Newark, New Jersey, on the 6th of September, 1919, on the property in question and permits other concurrent insurance without designating the amount). (1213)

To which the defendant objects and excepts for the reason that the same is hearsay and secondary, no proper foundation laid for its introduction, appears on its face to be a copy, parties who made the copy not having identified or sworn to its accuracy. And it is immaterial and doesn't tend to prove or disprove in a legal and competent way charges against the defendant in this case. Objection overruled and Exhibit received. (261)

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[fol. 75] Mr. WAGGONER recalled: "At the former trial there was introduced in evidence a policy of insurance issued by the Rhode Island Insurance Company of Providence, Rhode Island. At the time of the trial it was delivered to the Clerk of the Courts, later to Miss DeLap for the purpose of making a copy. (262) I saw the copy that was made, Exhibit "4" is the copy. I also at the former trial saw the policy that was issued by the North British & Mercantile Insurance Company. It was introduced at the former trial. Miss DeLap made a copy of that policy. (263) The State's Exhibit "5" is a copy of that policy. (264) There was also introduced in evidence at the former trial a policy of the Security Insurance Company of New Haven, Connecticut, of which Miss DeLap made a copy. Exhibit "6" is the copy. Also a policy of the United States Fire Insurance Company of New York City, (264) of which Exhibit "7" is a copy. Also a copy of the Palatine Insurance Company, Limited, of London, England, of which State's Exhibit "8" is a copy. (265) Also policy of the Northwest National Insurance Company, of Milwaukee, Wisconsin, of which State's Exhibit "9" is a copy. Also policy of the Firemen's Fund Insurance Company of San Francisco, California, (266) of which Exhibit "10" is a copy. Also the policy of the United States Fire Insurance Company and the North River Insurance Company both of New York City, of which (267) Exhibit "11" is a copy. All of these copies were filed with the Clerk

of the Court pursuant to stipulation between parties in the former trial." (268)

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H. R. WHITEHOUSE, re-called by the prosecution, testified: "Exhibit '12' is the original policy that was issued to Mr. Egan on the 6th day of September." (269)

State offers in evidence Exhibit "12," which is as follows: (Policy of insurance on the property in question issued by the Firemen's Insurance Company of Newark, New Jersey, to the defendant on the 6th day of September, 1919, and permitting other concurrent insurance without limiting amount.) (1213)

NOTE.—(This is the same as Exhibit "3" which is a copy of Exhibit "12.") Exhibit received.

"At that time we also represented the Rhode Island Company, and on the 17th of October, we issued a policy of insurance to George W. Egan in th Rhode Island Company covering this same property. (269). The Rhode Island Policy was issued on October 17, 1919. (271) I saw the policy at the former trial of this case. It was a standard South Dakota policy for twenty-five hundred dollars against fire and lightning." (271)

State offers in evidence Exhibits "15" and "16," which Exhibits are [fol. 77] as follows: (Exhibit "15" is a certificate of authority issued to the Rhode Island Insurance Company). (1427) (Exhibit "16," is a certified copy of the Articles of Incorporation of the Rhode Island Insurance Company). (1279)

The defendant objects and excepts on the ground that they are hearsay, secondary, no proper foundation laid, irrelevant, incompetent and immaterial. Overruled and exception allowed.

State offers in evidence Exhibit "4," which Exhibit is as follows: (Copy of insurance policy issued by the Rhode Island Insurance Company to the defendant on the property in question, on the 17th of October, 1919, for the sum of \$2,500.00, and permitting other concurrent insurance without limit.) (1219)

Defendant objects and excepts on the ground that same is secondary and hearsay, incompetent, immaterial and does not tend to prove or disprove the charge of the information, and is not the policy in question, or a copy of the policy in question in this trial. Overruled, exception allowed. Exhibit received. (272)

Cross-examination by Mr. Egan:

"I did not see the letter dated January 10th signed by Mr. Egan, or this piece of paper attached, signed 'George W. Egan.'" (274)

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T. W. SEXTON, produced by the prosecution, testified: (273) "My [fol. 78] agency represents the Security Insurance Company and the North British Mercantile Insurance Companies. I know the

Al Fresco Park property. I represented the Security Insurance Company of New Haven, Connecticut, on the 28th day of October, 1919. We issued a policy of Insurance upon this Al Fresco Park property to George W. Egan, against fire and lightning, (273) for Twenty-five hundred dollars, on the real estate and Seven Hundred and Fifty Dollars on the personal property. The policy was mailed to Mr. Egan."

State offers in evidence Exhibits "17," and "18," which said Exhibits are as follows: (274) (Exhibit "17" is a certificate of authority issued to the Security Insurance Company). (1428) (Exhibit "18" is a copy of the Articles of Incorporation of the Security Insurance Company). (1285)

To the State's proposed Exhibits "17" and "18," the defendant objects and excepts for the reason that the same is secondary, hearsay, and incompetent, as not tending to prove or disprove the charge in the information, and as pertaining to a separate and different policy than on which the defendant is placed on trial. (274) And is prejudicial to the rights of the defendant. Overruled. Exhibit received. (275)

State offers in evidence Exhibit "6," being as follows: (275) [fol. 79] (Copy of Insurance Policy of the Security Insurance Company issued to the defendant on the property in question, on the 28th of October, 1919, against damage by fire in the sum of \$2,500.00, and permitting other concurrent insurance without limit). (1232)

Defendant objects and excepts to said Exhibit for the reason that the same is incompetent, no proper foundation having been laid, hearsay, and it is secondary, and it is prejudicial to the rights of the defendant, and is not the policy or a copy, doesn't purport to be a copy of the policy, on which the defendant is placed on trial in this case. Objection overruled. Exhibit received. (275)

"On the 13th day of October, 1919, I was the agent of the North British and Mercantile Insurance Company, and on that date I issued a policy to Mr. Egan upon the same property for Five Thousand Dollars." (275)

State offers in evidence Exhibits "19" and "20," which said Exhibits are as follows: (276) (Exhibit "19" is copy of the Articles of Incorporation of the North British and Mercantile Insurance Company). (1302). (Exhibit "20" is certificate of authority of the North British and Mercantile Insurance Company). (1429)

The defendant objects and excepts on the ground that they are [fol. 80] hearsay, secondary, no proper foundation laid, irrelevant, incompetent and immaterial. Overruled and exception allowed. (276)

State offers in evidence Exhibit "5," which said Exhibit is as follows: (276). (Copy of insurance policy issued to the defendant by the North British and Mercantile Insurance Company. (1226) in the sum of \$5,000.00, issued on the 13th of October, 1919, and permitting other concurrent insurance without limit).

Defendant objects and excepts on the ground that it is hearsay, secondary, no proper foundation laid, irrelevant, incompetent and immaterial. Overruled. Exception allowed. Exhibit admitted. (276)

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W. C. HOLLISTER, produced by the State, testified as follows: "I am engaged in business with the Hollister Insurance Agency, and on the 12th of October, 1919, I was representing the Palatine Insurance Company Limited of London, England, and on that date issued a policy to George W. Egan on the Al Fresco Park property." (276).

State offers in evidence Exhibits "21" and "22," which said Exhibits are as follows: (277). (Exhibit "21" is copy of Articles of Incorporation of the Palatine Insurance Company). (1305). (Ex-[fol. 81] hibit "22" is certificate of authority of the Palatine Insurance Company). (1346)

Defendants objects and excepts on the ground that they are hearsay, secondary, no proper foundation having been laid, irrelevant, incompetent and immaterial. Overruled. Exception allowed. Exhibits admitted.

State offers in evidence Exhibit "8," which said Exhibit is as follows: (Copy of insurance policy issued to the defendant by the Palatine Insurance Company on the property in question for the sum of \$5,000.00, on the 17th of October, 1919, and permitting other concurrent insurance without limit). (1244)

Defendant objects as being hearsay and secondary, irrelevant, incompetent and immaterial to the issues here joined. Objection overruled. Exception allowed. Exhibit admitted. (277)

Cross-examination by Mr. Egan:

"Before we wrote this policy for Mr. Egan, we went to South Sioux Falls and inspected this property, and agreed on what property the policy should cover. (278) Mr. Egan stated to me that the dance hall was to be discontinued very soon. At the time we inspected the property before the policy was written, I said that as long as the dance hall was not torn down it would have to be writ-[fol. 82] ten of the property as it was, but later on it could be cancelled and written the proper way. (279) The talk was that the dance pavilion would be discontinued and taken down, and that was what Mr. Egan agreed to do with it." (280)

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T. W. SEXTON, re-called for further cross-examination by Mr. Egan, testified: "I had a talk with Mr. Egan before the policy, Exhibit "6," was written. (280) I had a talk about the building before the insurance was written as to what part of it was to be torn down. (281) The policy was simply to cover a two and one-

half story frame buildin-, Mr. Egan stated, to be used as a residence, and the dancing pavilion that was attached to it was to be torn down very soon." (282)

Redirect examination by Mr. Waggoner:

"This conversation took place, first about the 13th of October, when I issued the North British Mercantile Policy. When the Security Company's policy was written, the application was handed to me to be forwarded to the Company, it was stated just what it was to cover, the main building, by my clerk. I did not hear much of Mr. Egan's conversation with the man who took the application. I just arrived as he concluded. (283) I heard part of this conversation. Heard that it was to cover the main building 40x60 feet, two and a half stories. This conversation was between Mr. Egan and [fol. 83] my clerk. It was said and understood that it was to cover the main building. (284) I heard Mr. Egan say it was to cover the main building." (284)

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GEORGE BARNETT, produced by prosecution, testified: "I am connected with the Knowles, Dwight and Barnett, and we represented the Northwestern National Insurance Company of Milwaukee, Wisconsin, and the Firemen's Fund Insurance Company of San Francisco, California, and on the 10th day of September, 1919, issued a policy to George W. Egan. (287) I saw the original policy down in this Court before at the former trial. The original was mailed to Mr. Egan."

State offers in evidence Exhibits "23" and "24," which said Exhibits are as follows: (288) (Exhibit "23" is a certificate of authority of the Northwestern National Insurance Company). (1430) (Exhibit "25" is copy of the Articles of Incorporation of the Northwestern National Insurance Company). (1350)

Defendant objects and excepts for the reason that the same is secondary, hearsay, and incompetent, irrelevant and immaterial, and no proper foundation laid. Overruled. Exception allowed. Exhibits admitted. (288)

State offers in evidence Exhibit "9," which said Exhibit is as [fol. 84] follows: (Copy of policy of insurance issued by the Northwestern National Insurance Company of Milwaukee, Wisconsin, for \$2,500.00, on the 10th of September, 1919, and permitting other concurrent insurance without limit. (1250)

Objected to as being hearsay and secondary and incompetent, never been identified by the parties that made it, no proper foundation laid, as being irrelevant and immaterial to the issues here. Objection overruled. Exception allowed. Exhibit admitted.

"We also issued a policy to Mr. Egan on the 5th day of November, 1919, in the Firemen's Fund Insurance Company of San Francisco, California. I saw the policy at the other trial."

State offers in evidence Exhibits "25" and "26," which said Exhibits are as follows: (288) (Exhibit "25" is copy of amended Articles of Incorporation of the Firemen's Fund Insurance Company.) (1357) (Exhibit "26" is certificate of authority of the Firemen's Fund Insurance Company.) (1366)

The defendant objects and excepts on the ground that they are hearsay, secondary, no proper foundation having been laid, irrelevant, incompetent and immaterial. Objection overruled and exception allowed. Exhibits admitted. (288)

[fol. 85] State offers in evidence Exhibit "10," which said Exhibit is as follows: Copy of insurance policy issued by the Firemen's Fund Insurance Company of San Francisco, California, on the property in question in the sum of \$2,500.00 on the 5th day of November, 1919, and permitting other concurrent insurance without limit). (1257)

Same objection as made to the last alleged copy of the policy, hearsay and secondary and no proper foundation laid. Objection overruled. Exception allowed. Exhibit admitted. (288.)

#### Cross-examination by Mr. Egan:

"Exhibit 9" was written on the 10th of September, and at that time there was a dance pavilion attached. At the time Exhibit "10" was written, I believe there was no dance pavilion attached. In writing in the description in Exhibit "9," we took it from our records of an old policy. (289.) Our custom would be if it had not been because of some conversation, to follow the descriptions of old policies in writing new ones." (290.)

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GEORGE McDONALD, produced by the prosecution, testified: "On or about the 31st day of October, 1919, I was representing the United States Fire Insurance Company of the City of New York. And about that time the Company issued a policy to Mr. Eagan on the Al Fresco Park property. Have not seen the policy since it was issued." (296.) [fol. 86] State offers in evidence Exhibits "27" and "28," which said Exhibits are as follows: (296) (Exhibit "27" is copy of the Articles of Incorporation of the United States Fire Insurance Company of New York City). (1367.) (Exhibit "28" is certificate of authority of the United States Fire Insurance Company, of New York City.) (1431.)

To the proposed Exhibits "27" and "28," the defendant objects as being secondary and hearsay. It is incompetent, irrelevant and immaterial under the change in the information. Objection overruled. Exception allowed. Exhibits admitted.

State offers in evidence Exhibit "7," which said Exhibit is as follows (296): (Copy of the insurance issued to the defendant by the United States Fire Insurance Company, of New York, in the sum of \$2,500.00, on the 31st day of October, 1919, and permitting other concurrent insurance without limit.) (1238.)

Defendants objects, no proper foundation having been laid, not identified and as being irrelevant, incompetent, and immaterial under

the charge in the information. Objection overruled. Exception allowed. Exhibit admitted. (296.)

Cross-examination by Mr. Egan:

"Before I wrote the application for this policy, I had a talk with [fol. 87] Mr. Egan about the property it should cover. I have known the building for twenty odd years, and Mr. Egan said he was going to fix it up as a summer home, and he told me the dance pavilion was to be removed, and I was not to include it in the application." (297.)

Redirect examination by Mr. Waggoner:

"I got my facts in regard to what I put into the application from a policy which Mr. Hollister had written, and that is the only information I got, except what he was going to do with the building, with the addition to it. The application dated Sioux Falls, South Dakota, on the 30th of October, 1919, which is attached to and a part of the circuit court files Number 17824, is a written application which I filled out and sent to the Company. That is my signature to it. (298.) That is my writing on the back of the application, and my signature on the bottom. It is all my writing, I even signed Mr. Egan's name."

State offers in evidence Exhibit "29," which Exhibit is as follows: (Application purporting to have been made on the 30th day of October, 1919.) (299.)

Cross-examination by Mr. Egan:

"This application was never shown to Mr. Egan at any time. It was filled out and sent by me direct to the Company, from some other policy without any information from Mr. Egan. On the back of the Exhibit the signature of George W. Egan was not signed by Mr. [fol. 88] Egan." (299.)

ROY NUGEN, produced by the prosecution, testified: "I am connected with the firm of Nugen & Williams Agency, doing fire insurance business, and on the 27th day of October, 1919, had some business transactions and dealings with George W. Egan."

State offers in evidence Exhibits "30" and "31," which Exhibits are as follows: (Exhibit "30" is a certified copy of the charter of the North River Insurance Company.) (1375.) (Exhibit "31" is certificate of authority of the North River Insurance Company of New York.) (1432.)

Objected to as no proper foundation laid, irrelevant, incompetent, and immaterial. Objection overruled and exception allowed. Exhibits admitted.

"The defendant at that time in my office signed an application for insurance which is Exhibit '32.' After it was signed it was forwarded

to the Western Department of the Company at Freeport, Illinois, by myself. (301.) I saw the signature signed to the back of Exhibit '32,' and it is Mr. Egan's signature. I refer to the one under date of October 24, 1919. The slip was not attached to the Exhibit when it was signed, and the slip on the front of it was not attached when it [fol. 89] was made up."

State offers in evidence Exhibit "32," which said Exhibit is as follows: (Application signed by Geo. W. Egan to United States Fire Insurance Company and the North River Insurance Company of New York, upon the property in question for \$2,500.00, on the 24th of October, 1919, in such application in answer to question No. 16, which is as follows.

Q. Is there any other insurance on this property or other property on the premises, in another Company? If so give name of Company, and state what the policy covers.

A. (In typewriting.) Palatine, \$5,000.00, on house 1 50 3 years, concur. (1109.)

Defendant objects to Exhibit "32" on the following grounds: It is incompetent because this is not a suit in which the company is suing the defendant or seeking to vitiate a policy on the ground of misrepresentation or fraud. And that the proposed Exhibit is not in the original condition that it was, it doesn't tend to prove or disprove any of the issues in this case, the copy of the policy having been admitted over the objection of the defendant by the order of the court; and the only possible thing it would be competent for if anything, is to show the amount of the insurance and not any condition under which [fol. 90] it was received. And this Exhibit contains extraneous matter and is prejudicial to the rights of the defendant because it is immaterial and irrelevant, bearing on side issues and on different cases. This is a criminal suit in which the defendant is specifically charged, not with filing a false claim for proof of loss with this Company to which this Exhibit "32" refers, but to another and separate and different company named in the information. Stated that it wasn't in the same condition, that is the stickers and pasters and posters, also attached to the said proposed Exhibit. The Exhibit itself is incompetent for all the reasons named, and that no part of the said Exhibit is competent in this hearing.

By the Court: "I think Mr. State's Attorney you had better show what was not on it." (302)

"The following was not on the Exhibit when signed by Mr. Egan: This "Received" stamp dated October 31, 1919, signed by signature of "Crumm & Foster," "Western Department," "F. M. Gunn, Manager," is one mark that was put on later at Freeport. "Farm Solicitor" in large type is a stamp that was stamped on after it left our office. The square stamp with wording "Entered November 5th" upside down, "1919 L. R" was stamped on after the application was signed. The large initials in blue pencil "M. S." were added [fol. 91] later, the wording "Combined Fire" dollar sign "43.75" in

blue pencil "& Tornado \$18.75" in blue pencil were put on afterwards. (303) And there are three straight lines, one under the first item of the policy or of the application, one immediately above the loss payable entry, one immediately below the loss payable information. These were added. There is an ink memo at the bottom here as follows "State's Ex. 32," which has been added. There are two lead pencil notations, namely, "Fire, 1.75 and Tornado 75" which lead pencil notations have been added after it was signed. (303) And that stamp here under the (303) heading of "Classification" showing twenty-five hundred dollars "\$43.75" looked like "15 F. N." and in the same stamp is indicated twenty-five hundred dollars "\$18.75" and it appears to be "0 1 5 F." That is the classification stamp which was undoubtedly put on in the Freeport office, and I think that is all on the face of the application, unless possibly it would be this lead pencil notation in the upper left hand corner, "C 4515" with a line through it. Also lead pencil entry of the policy number which was issued, namely, "40029." I see nothing else on the face of the application that was put on after the signature. On the back of the application there are two straight blue lines [fol. 92] written with blue pencil; there is one blue circle or oval around the occupancy question No. 5. There is one circular blue line around question 14, and a circular blue line——"

Q. "Wouldn't that be answer 14?"

A. Around numbers 16 and 17, a circular received stamp showing date October 27, 1919, "Crumm & Forster, Western Department, F. M. Crumm, Manager." Those were all put on after it was signed. I believe that is all." (304)

Examination by Mr. Egan:

"When Mr. Egan came into our office he brought a policy covering this same property from which we were to copy the description. Either I or one of the young men in the office handed Mr. Egan an application, when he signed it he turned it over to me. Then he went out, and later came back and got the policy." (305)

Defendant objects further to this Exhibit on the following grounds: That it is shown by the witness that the Exhibit is not in the shape or condition that it was in anyway when it was signed by the defendant, and that it has been marked up and entered on both sides, and that it was as a matter of fact signed in blank, and another policy left from which the description and the facts were to be copied; and that this is not a suit between the United States Underwriters and George W. Egan in which he is seeking in this particular case [fol. 93] to recover the insurance; that there is not a charge in which this company is a party, or fraud, or obtaining policies by misrepresentation. That this is prejudicial and incompetent, immaterial under the information in this case. Doesn't tend to prove or disprove any of the issues. It is not a document by which in any wise under the record the defendant could be bound, but an

instrument that has passed from office to office, from hand to hand, bears stamps and marks of different and various persons. (306)

"Mr. Egan was handed a blank application and he signed it, and he also entered in his own hand writing the answers that are indicated on the back of this application, and no others."

Objection overruled. Exhibit received. Exception allowed. (306)

Mr. Waggoner, continuing: There was a policy issued to Mr. Egan after this application was sent. (303)

State offers in evidence Exhibit "11," which said Exhibit is as follows: (307) (Copy of insurance policy issued to defendant on the property in question by the United States Fire and the North River Insurance Companies on October 27, 1920, which is a standard form and provides that other concurrent insurance is permitted without limit). (1263)

[fol. 94] This is objected to on all of the grounds heretofore and the additional ground that the alleged application that has been offered in evidence and received over the objection of the defendant is not the application for this particular policy from this company, but a general application, might apply to any company and this is incompetent, immaterial, not binding on the defendant, hearsay and secondary. Overruled. Exception allowed. Exhibit admitted.

(Exhibit "11" is a copy of the policy which was issued subsequent to the application of Exhibit "32"). (307)

Cross-examination by Mr. Egan:

"All of the typewriting on Exhibit "32" was done after Mr. Egan left our office. Mr. Egan gave us the description, the size of the building 60 x 40, and where it says "Wing" there is an "X," everything except what was in Mr. Egan's handwriting including all the typewriting was done after Mr. Egan left."

Mr. Egan: Now I renew my objection, on all the grounds to be by the stenographer extended if necessary to extend them. Motion denied. Exception allowed. (308)

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C. J. POTTER, produced by the prosecution, testified: "I live in Mitchell, South Dakota, and am in the fire insurance business, connected with the Security and New Haven Underwriters. (309) I know George W. Egan, and saw him on the 28th day of October, 1919, in the office of Thos. Sexton in Sioux Falls, South Dakota. There was at that time an application for insurance made by the defendant in writing. I wrote out the application, and it was signed by Egan. It was signed right after it was filled out. Exhibit "33" is the application which I have just referred to. (310) The following marks were not on said Exhibit "33" when Mr. Egan signed it. There is at the top "State's Exhibit 33" and in red pencil "I twenty-five hundred 43.75" and below it "2" I think it is "450

1312" above that there is a figure "3" and then stamped in "May 28, 1920," "Filed May 28, 1920, Minnehaha County, South Dakota." I guess it is "Edgar Haried," "Clerk of Circuit Court." Here is a stamp that is fine, I can't make that out. On the back there is, "Entered October 2, 1919," and a square stamp "November 26, 1919." Some marks down here. I don't know what they are. Then there is another one I can't make out, "1625 first re-insurance 15560." Another stamp here, that is not clear enough, that I can't make out. There is written across the face of it, "other concurrent insurance permitted." I don't think that is my writing. (311) [fol. 96] The solicitor's report to the Company signed T. W. Sexton on the back of Exhibit "33," was not made out at the time it was signed by Mr. Egan. I think just the fact of the application was made out before he signed it, if I remember right." (311)

The State offers in evidence the front side or face of Exhibit "33." Which Exhibit is as follows: (Application by the defendant to the Security Insurance Company dated 10-28-19, in which question 17 is as follows:

Q. Have you any other insurance? If so, how much and what is insured?

A. (In indelible pencil in longhand.) Yes, \$5,000.00. The signature of the defendant is in ink.) (1433)

#### Cross-examination by Mr. Egan:

"Mr. Lalley was present when I met Mr. Egan. Mr. Sexton came in about the time I left the office. Mr. Egan came in and asked Mr. Lalley what companies wrote farm insurance. Mr. Lalley named several, including the Security, and then introduced me to Mr. Egan. Mr. Egan stated he wanted additional fire insurance on his summer home. (312) Mr. Egan did not tell me that I was not to include the dance pavilion. (313) The dance pavilion was mentioned. Mr. Egan said he had purchased a building in the south [fol. 97] part of town which he was remodeling for a summer home. There was no specific mention of the dance pavilion, except that the building was being remodeled for a summer home. (314) My understanding was that the dance pavilion was down at the time. I got the impression because I was insuring it as a summer home. I knew there was a dance pavilion there from hearsay, and that was from what Mr. Egan said in the office that morning. He told me that he had, or was going to take down the dance pavilion. The description of the property and size of the building and the location of it Mr. Lalley got from the records of another policy. It was written in the application before Egan left. (315) The line "Other concurrent insurance permitted" had been written in since I wrote the application. Mr. Sexton had authority to do it." (316)

Exhibit "33" is objected to as being incompetent, because it is irrelevant and immaterial, and is not in a suit in which the defendant is charged with obtaining insurance by fraud, not in a suit between the insurance company and the defendant. Doesn't tend

to prove or disprove any of the issues in this case, and is prejudicial to the rights of the defendant. Overruled. Exception allowed. Exhibit admitted. (317)

Mr. Waggoner reads the dates, amounts and description of the [fol. 98] property in the policies to the jury. (318)

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H. H. SYMONDS, produced by the prosecution, testified: "I am County Surveyor of Minnehaha County. Previous to the first trial of this case, I made a survey of the property known as tracts 4 and 5 of County Auditor's Subdivision of the Northwest Quarter of Section 32-101-49. (318) Exhibit '34' is a plat which I drew from the survey. (319) This survey was made on May 10, 1920."

The State offers in evidence Exhibit "34," which is as follows: (321) (A plat of the property in question.) (321)

Objected to as incompetent, immaterial and irrelevant to any issue, and not made while the building was standing, incompetent, irrelevant and immaterial. Overruled. Exception allowed. Exhibit admitted. (321)

"The building was 44 x 60. (324) There wasn't any of the wooden structure left when I made this chart, with the exception of a few burned pieces of wood. (324) I noticed where the joists had been on the wall they showed a distance apart of the joists, they were sixteen inches apart from center to center." (325)

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GEORGE B. HENDERSON, produced by the prosecution, testified: [fol. 99] "I live in Sioux Falls, probably for two years, and for six years prior to that on the flat known as South Sioux Falls, about seventy rods west of Al Fresco Park, where I farmed and ran a threshing machine. I know Mr. Egan. (326) In August, 1919, I sold him a contract on a farm I had out at Colton. In September I stored some of my household goods in the Al Fresco Park building. (327) I asked Mr. Egan if I could put my stuff in there and he said to "put all the damn stuff you have a mind to in there; whatever you do don't burn the damned thing up; I don't give a damn if you do burn the damned thing up." That was all that was said. I stored the first part of my goods in there the middle of September, and the balance the first part of October. My wife went to visit her folks down in Illinois. (328) And I went over in Minnesota. I stayed down at the Egan property and started to work for Egan. I hired out to help wreck that dance hall. (329) I started wrecking the dance hall about the 17th of October, 1919. It took a little better than ten days to wreck it." (330)

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C. J. POTTER, re-called for further cross-examination by Mr. Egan, testified: "Mr. Egan spoke first about insurance in Sexton's office. (331) In substance when Mr. Egan came in, Mr. Lalley introduced

[fol. 100] me to Mr. Egan, and said Mr. Egan can't you give him a policy on your property. I said to Mr. Lalley get an application blank. Mr. Egan did not sign it before anything else was put on it. Mr. Sexton came in just as Mr. Egan was leaving the office. (332) Just after Mr. Sexton came in it was mentioned that Mr. Egan had given us a policy on the property. Mr. Egan did not say that he hadn't yet taken down the dance pavilion. My understanding was we were insuring a dwelling house. It is not true that Mr. Lalley got a policy that he formerly had written on the same property, and from that copy, copied the description and information." (333)

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GEORGE R. HENDERSON, re-called on behalf of the State, testified: "We started wrecking the dance pavilion about the 17th of October, 1919, or a little bit later. (334) All of the material of the dance pavilion, except the maple flooring, was hauled over to where Mr. Egan was building some new buildings. The flooring was hauled away some day when I was not there. It was hauled in to the Egan Building, or the old Peck Building in Sioux Falls. While wrecking this building I stayed in the Al Fresco building, and had my household goods there. (335) I had my bed and lived there in the house. Egan knew I was staying there nights. I presume I told him I stayed there. After the building was wrecked, Egan told [fol. 101] me he did not want me to go away from the building. Not to go away a single night without letting him know about it. That was probably two or three weeks before the fire. (336) About ten days before the fire he asked me if I would not go out and stay all night with the boys up to the farm near Colton. This was the farm I sold to Mr. Egan, and the boys lived on the farm. He did not say what he wanted me to do up to the farm. Possession of it wasn't to be given until the 1st of the following March. (337) I was the boss and overseer in the wrecking of the dance pavilion. When we started to wreck the building, he spoke about piling the lumber outside, and I said the best thing he could do was to pile it inside. He said he would not like to pile it inside on account of the danger of fire. (338) Before the dance hall was torn down I spoke to Mr. Egan about buying it from him, and he said if I bought that material, he would not be responsible in case of fire. (339) On the 23rd of November, 1919, besides my household goods and some household goods of Mr. Nash, there were 42 collapsible chairs, nine porch seats, and seven ice cream stands, three wire-legged ice cream stands, twenty-one wirelegged chairs, three small wire-legged stools, two counters and two cupboards, water filter and a couple of benches, [fol. 102] about sixty gallons of paint and two kegs of shingle nails, altogether about One Hundred and Seventy-five dollars worth, exclusive of the paint and nails and all the personal property in the building belonging to Nash and myself. My entire outfit of household effects, wearing apparel both for myself and my wife was in there. Nash was the man who lived there before I did. There was a steam heating plant in the building. (341) And about a dozen

radiators. On the 23rd of November the day before the fire, these radiators were not there, they were taken away one day when I was over working on the new barn. The bath tub and sink and toilet were removed and were left just outside the door. They were taken out about two or three weeks before the fire. (342) The bath tub was taken up to the Peck Building later. Before the fire Egan talked to me like he wanted some straw hauled over, and he spoke to me two or three times about it. He said nice dry straw. He wanted Lorenzen the man where I used to live to haul it over. Before the straw was hauled he had talked to me about whether I would stay there or not during the winter, and I told him I did not intend to stay there, and would stay just till I could get a house here in town. I never asked him to bank up the house. There was nothing [fol. 103] in the house that would freeze up. (343) This talk was right after the dance pavilion was wrecked. He said I should give Mr. Lorenzen a load of straw for every one he hauled over. Defendant spoke about hauling it to the Northeast corner. (344) This straw was placed about ten feet Northeast from the cellar way. After the straw was hauled over, nobody touched it as far as I know. It was still there when I left on Sunday November 23rd. After it was hauled out, it rained and sleeted, and (345) Egan said, "That straw will all be spoiled down there now." I was still out there on the 23rd of November, 1919, and Egan came down and he said he had a case in court that involved some land in Buffalo County, and said he had just five days to appeal the case, and wanted to know if I would not go out that evening and look up the land, and I consented to go. I had never been in Buffalo County before, and knew nothing of the value of the real estate. (346) Mr. Egan had a decree of the Minnehaha County Court with him. He told me take the papers along and locate the land. He told me to wire right back what the land was worth. (347) He gave me a letter of introduction to Major Summers of Chamberlain, a man in the real estate business. The land was thirty miles from Chamberlain, which was the nearest [fol. 104] railroad station. (348) I went out and looked the land over, I sent Egan a telegram, and then I went over to Minnesota to my wife's folks for Thanksgiving. I did not tell Egan I was going to Minnesota. The property burned while I was gone. (349) I saw Egan after I came back to Sioux Falls, the day I returned, up in his office. (350) I had been requested to go to the Fire Chief's office, and I told Egan. He said, "You tell them you were over in Minnesota visiting your folks which you had a perfect right to. I had insurance on my property in the building, which I took out on the 13th of October. I had talked with Egan about taking it out before. I told him I did not have any insurance on it. Just about the time I got through wrecking the dance hall Egan said I had ought to take some insurance, that he had taken out seven hundred and fifty dollars insurance on the contents of that building, and he meant some of that to cover my property. (351) After the fire, Egan said he meant two hundred and fifty dollars on my personal property. I had a talk with him about my policy after the fire. He showed me his policies one day and he says, "George we have won

the game, I have paid my premiums and now by God I want my money, by God they have got to pay me." He had the policies in his [fol. 105] hands. (352) I had talked with the defendant before the fire about the possibility of fire. He asked me if I thought it would burn up if it caught fire, when I was up one time in his office. While I was cleaning up the dance pavilion he told me to gather up all the fine stuff and put it in the northeast or northwest room where it would be nice and dry. (353) I did not pile the stuff in the house. (354) On the 23rd day of November the last day I was in the building before I went to Buffalo County, I was out there about four o'clock, or a little later. I had left the place about nine o'clock that morning and got back about four. (355) I stayed there just long enough to take off my best clothes and put on a shabby suit. Mr. Egan and a stranger were there. There was no fire in the building in any stove at that time. The last fire was when I got my breakfast Sunday morning, and that fire was out. On the second Sunday after I stayed in the Al Fresco Park building, Mr. Egan and a Mr. Kellenburger came over there, and Mr. Egan said he wanted to make a sort of stone boat to haul lumber on, and asked me in this man's presence how to get in the building, in case I was not there, and I told him how to get in there. (355) Around January 5th and February 5, 1920, I had a talk with Mr. Egan about the money he owed me for this land up near Colton. (356) [fol. 106] He said he could not pay it until he got his insurance. Between the 5th of January and the 5th of February there was a hearing down in Mr. Waggoner's office before the Fire Marshal and I was called as a witness. When I went back for this payment on my Colton land, I had a talk with Egan, and he said he heard they had a hearing down there in Mr. Waggoner's office and he wanted to know if they were trying to hang something on to somebody, and that he wouldn't pay me until he found out how I was going to testify. On the top floor of this building there were two or three window lights broken out, and quite a bit of plaster off the ceiling in two rooms and it was the home of sparrows up there, some of the panels were kicked out of the doors, and part of the floor was torn up in the northeast room (357) and the roof leaked. It was a single white pine floor six inch boards. Some of the doors on the second floor were pretty badly smashed up, the locks pretty near all smashed off. Same kind of floors on second floor. (358) Several of the doors on the second floor were stolen. Most of the windows were in on the second floor. (359) Some places the plaster was knocked off and papered over and patched up. Downstairs the Southeast room was in fairly good shape, only the floor was [fol. 107] getting thin. The Southwest room had new maple floor. The woodwork was white pine. The casing was pretty badly chopped and battered up in places. One of the windows were gone on the west side. The panels were kicked out of that door leading up to the room where I had my furniture, and most of the doors in the northwest part of the room were chewed off at the corners by rats. (360) There were some rat holes in the floor. (361) There were nine windows in the cellar, and they were all gone, smashed, lights

and all. (362) The cellar door was an old rickety door just about ready to cave in (363) The man I saw with Mr. Egan on the 23rd day of November, I did not know. He was a heavy set man. Light complexioned, about five feet ten inches tall, and about fifty years old. It was Mr. Egan's car." (364)

Cross-examination by Mr. Egan:

"At the time I finished wrecking the dance pavilion I told Mr. Egan I did not have any insurance on my personal property. It was along about the middle of September that I met Mr. Egan at the Cataract Hotel. (366) I moved all the stuff I had over to the building. John Seubert was with me in the Cataract Hotel when I saw Egan. (367) Mr. Egan did not say to me when I asked [fol. 108] him about storing my goods in his house, "It is al-right with me Mr. Henderson, see Mr. Nash, get permission to, if it is al-right with him, put your stuff in one of the unoccupied rooms." (368) He did not say to me that if I put my stuff in there it would be at my own risk, and he would not be responsible for it if it was stolen or burned." (369).

Q. "Who moved your stuff down to Sioux Falls when you first went there?"

A. "Honorable P. M. Hall."

Q. "Honorable P. M. Hall?"

A. "Yes sir."

Q. "Now is that because he has been a member of the legislature or is that sa-casm on your part?"

A. "No because he is a good friend of your-."

Q. "That makes him honorable in your mind?"

A. "Yes. (371).

I stored four beds in the building and a piano, and some bedding and wearing apparel and a lot of stuff like that. (371). Three dressers, three commodes, a library table, cot, music cabinet, four stoves and a lot of other stuff I don't recall. I occupied three rooms in the building where I had my stuff stored. (372). I had a thousand dollars worth of insurance upon my property, and got my money. (373) The first conversation I had about fire with Mr. Egan was when we started to pull down the maple floor. (374). I asked Mr. Egan about piling that stuff in the hallway of the hotel, and he said he did not want any there on account of the danger of [fol. 109] fire. I told him it would all get spoiled if it rained on it, and he said nothing further."

Q. "So that didn't create any suggestion that he was going to have you burn the building or burn it himself, or have somebody burn it, did it?" (375)

A. "No. The next conversation was when I was talking about buying that material. It was shortly after the first one. Egan said in case I bought the material he would not be responsible in case of fire. (376) The third time was about piling that stuff up so close to the building, the other lumber Mr. Egan said he did not think I ought to pile it so close on account of danger of fire. I

followed my own judgment as to where to pile it. (377). It isn't true that when the lumber was hauled away from the dance pavilion there was a lot of pieces and blocks left around and that Mr. Egan asked me if I did not want to pick those up to use in the furnace, after I was living there, starting my fires. I had another conversation in your office. (379) Five doors were stolen from the second floor. (381) There was a couple pretty big patches of plaster off in two different rooms out of five about the size of the table here in the court room for each room. Two or three windows were broken on the third floor, plaster on the second floor was not so awful bad. [fol. 110] (384) There were twenty-three rooms in the building. (385) Mr. Egan told me never to go away from the building without letting him know. This conversation was after the 8th of November. (358). These three talks I have told about in regard to the fire and to not leaving the place were all the conversations I had. (388) I said something to Mr. Egan about it being cold in the building nights when we were sleeping. Mr. Egan told me to pile some straw up around it. I said the wind was sweeping in there, and Mr. Egan said we better have some *some* of that old straw hauled over and bank up the corners. (388). One morning we rode over on a load of lumber, I told him it was a cold old house, and I would not stay there, and I did not want it banked up, we had been talking about hauling straw over to bank it up. Mr. Egan told me he would have the little German haul the straw over to bank up the corners. The little German hauled the straw over that I told him to, and put it on the ground where I told him to. (390) I am the man who told him to bring it over, and told him where to unload it. He hauled over the old straw, it was the butt of the straw pile. It was old rotten straw of the year of 1918 that he brought over and the straw is still there as I left it. (391) Egan did not know [fol. 111] I had my property insured for one thousand dollars. (392) Mr. Egan told me he would like to have this land in Buffalo County personally inspected. He told me to go up and see it and see the lay of it and to look it up thoroughly. (396) The straw that was hauled up to the building had been laying out in the sun and rains since the year before and was old straw. (397) I understand the straw was to be used for banking, I understood so from what Mr. Egan told me, and that is what he told the man that hauled it over. He told the little German that hauled it over that he could take a load of good straw for every load of old straw that he hauled over. (398) I was up to the farm near Colton that I sold to him with Mr. Egan, and the man that lived there was making some complaint about fixing repairs. Mr. Egan did not ask me to go up and help make the repairs, he just said go up and stay all night. (399) I remember talking some one day to George W. Egan, a farmer and J. C. Dunkelburger in which the name of Geo. W. Egan and the burning of this building was had. This was on the 1st of March, 1920, on the steps of the Cataract Hotel. I would have to say no in its fullness, to the question of whether at such time and place I said in substance and effect as follows: "Damn him if he doesn't pay me I will send him to the penitentiary." I

would have to say no in its fullness, to the question as to whether [fol. 112] George W. Egan, the farmer, said to me, "What could you send him to the penitentiary for," and that I stated, "For burning that building down in South Sioux Falls." (403)

Q. "Did you have a conversation with Nick Stoffels in the presence of Mr. Goldhagen in the Chicago Hotel just prior to the hearing in Municipal Court in this case, in which you stated in substance and effect that the "First Marshall had told you that he had spent a thousand dollars running you down, and that they were running Egan down, meaning George W. Egan, and that there was going to be a trial and a lot of suspicious things would be brought out, but that you would save yourself; and that the Fire Marshall had threatened to arrest you, that the insurance company had refused to pay you the insurance on your goods and that you might be arrested, that you didn't give a damn about Egan that you were going to protect yourself?"

A. "Not in the presence of Goldhagen."

Q. "Well in the presence of either of these men?"

A. "Part of that there I had conversation to that effect." (405)

Q. "But as to the whole question, your answer should be yes or no?"

A. "I could say yes, but no to the entire thing. If I had to answer it in its entirety I would say no. I had that conversation, [fol. 113] or some of that, but not in its entirety. (405) There was nothing suspicious in my mind because Mr. Egan wanted to know how to get into his building when I wasn't there. (407) I did not know if there was anything suspicious in my mind because Mr. Egan told me that it might be better to pile the lumber outside of the building instead of inside in case there would be fire. Mr. Egan made no fuss with me about it, just simply suggested that it might be safer to pile it outside. (408) At the time I talked with Mr. Egan about not having insurance on my property, Egan just simply drove out there and in the talk asked if I had any insurance, and I said 'no'. (410) Mr. Egan never asked me to burn the building." (411)

Redirect examination by Mr. Waggoner:

"I had a conversation with Mr. Egan with regard to a car which contained some rope and window sash and articles like that, and I asked Mr. Egan if it would not be advisable to put that stuff in the old hotel building to keep it out of the rain, and he did not want me to because of the danger of fire, so the stuff was piled on the ground out by the car. (414) The timbers and sills in the building were 2 x 10, and the floor joists 2 x 10 sixteen inches apart. [fol. 114] They were box sills 2 x 8 and 2 x 10, the building was 2 x 4 and the rafter- were 2 x 4." (416)

ED MARTIN, produced by the prosecution, testified: "I live in Mitchell, South Dakota, and have for six years. During the past thirteen years in Davison County. Have been farming and organizing farm unions. (417) I have known George Egan for about eight years. My relations with Egan have been friendly. (418) I helped him some in his campaign. (419) I talked with Mr. Egan relative to a fire, but I don't know whether it was the Al Fresco, or where it was. He told me when he was in Mitchell that he had a big barn on his farm burn down. I talked with him in Sioux Falls once but I could not come no where near telling the date, it was sometime a couple of years ago, but I did not keep it in mind. Did not pay any attention to it. I think it was near the early part of 1920. (420) The conversation ran something like this: In the first place we were talking about a building a barn, or he had the barn built and talked about putting in a hay door and asked me about how wide I figured a hay door should be, and it seemed like a large barn, and I said it costs lots of money to pile up lumber nowadays, well he said the insurance company was paying for it. Going to the depot that night, I think I spoke to him about the second fire first, and I said, he was in kind of hard luck with fires, and I said [fol. 115] even though a man does carry insurance he is loser anyhow. Well, he said he had it well insured. That was the impression that he left in my mind." (421)

Cross-examination by Mr. Egan:

"My best recollection is that this talk was in January." (423)

Defendant offers in evidence Exhibit "B," as part of the cross-examination of Henderson, the same being the document that was called to the attention of the witness on Sunday afternoon and furnished to him. Exhibit received.

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FLOYED NASH, produced by the prosecution, testified: "I live in the City of Sioux Falls, and am in the telephone business, and have been for about ten years. (425) I formerly lived at what is called Al Fresco Park, about six months in 1919, and left there about the middle of October, 1919. My family was there with me. I have two children. I moved away the day they started wrecking the dance pavilion, that was about a little better than a month before the fire. I rented the Al Fresco property from Mr. Hanson, and farmed five acres, (426) and continued to do that until the 15th of October, after Mr. Egan bought it. After I moved away I received a communication from the defendant relative to the personal property which I left there. Exhibit "35" is the communication.

State offers in evidence Exhibit "35." Exhibit received. (427)

"I know Mr. Henderson. He moved on the place about a week after I left. His family was there just a short time, and then he

lived alone. When I lived there the plastering was pretty badly off the top floor, and there were not a great many doors, and the windows were cracked and broken. The woodwork and flooring was six inch flooring, I believe. On the top floor I believe the roof leaked. The third floor was completely finished up. The second floor was in pretty fair shape. The doors were all there, the locks on the doors on the second floor were all right, and the floors were six inch flooring, soft pine, and pine woodwork. (428) The first floor was six inch flooring the same as the others, with the exception of one of the rooms which was oak. The other floors were quite badly worn and the woodwork was not very extra. The casings were cracked and the door panels were cracked, that is some of them were broken, and there were some rat holes around the floor, and the windows down stairs were broken and cracked with a few exceptions. (429) The locks on the doors couldn't be used and we nailed the door leading down in the cellar, and put a slide lock on the other [fol. 117] doors. (430) The cellar door was warped and could not be shut, I think there were two windows broken out."

Cross-examination by Mr. Egan:

"The nailing of the doors and the putting of 2 x 4 across the doors was not done by Mr. Egan. (431) Exhibit "35" stated the facts as I understood them." (432)

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FRED MUNCE, produced by the prosecution, testified: "I live in Sioux Falls and am a drayman. Previous to the Al Fresco Park fire, I hauled some property away from there, (434) for Mr. Egan I don't know how long before the fire. I have a record in my office which I will go and get."

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CHRIS LORENZEN, (Exhibit "36") a witness for the State, testified: "My name is Chris Lorenzen and I live down near the Al Fresco Park property. I know George Egan. I had a talk with him about hauling straw to the Al Fresco Park property. He came to my place and asked if I would haul some paper that was over at the dance hall over to where they were putting up that set of buildings. He was afraid it would freeze that night and he wanted to cover up those walls, and I told him I would, and he asked me if I would take over a load of banking for that Al Fresco hotel, and he told me to [fol. 118] put on a good load and I could take part of it home with me. I hauled two loads to the Al Fresco Park and left it north of the building. I didn't stack it up, I just threw it off the load." (436)

Cross-examination by Mr. Egan:

"I hauled up the old straw from the straw pile of the year before, it was old mildew straw. I asked Mr. Henderson if I should bank that building, he said, "No unload it on the north side of the building," and I did, put it where he wanted it. The straw was the same after the building burned as when I when I left it."

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Mrs. MATTIE LORENZEN, (Exhibit "37") a witness for the prosecution, testified: "We live just west of what is known as the Al Fresco Park property. On the night of the fire, and on the evening before the fire, I saw automobiles and cars out in that vicinity. I saw a car on the road north of Al Fresco Park. It was on the road which ran east of the Al Fresco property, on the north road and then went south to the park on the road which runs directly past the park north and south and on the road which runs directly east of it and went past Al Fresco house to the corner, and then went on the west road over to the corner by our house, and then went past our barn a little ways and then turned and went north. [fol. 119] north of where the trees were, I could not exactly say how far and then stopped. It was between 8 and 9 o'clock in the evening. It was dark. It had lights when I first saw it, and then turned the lights out, it was there by the willows possibly half an hour, and then it went back the same way it came." (436)

Cross-examination by Mr. Egan:

"I could not see whether any one got out of it or not, because it was dark. The car did not stop at all at the Al Fresco Park property, just came down the road and went west between our house and Mr. Nash's, and then they turned north and went by our barn. I see a lot of cars going around that road in the evening. I saw no one get out of the car."

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JOHN LORENZEN, (Exhibit "38") produced by the prosecution, testified:

"I am eleven years old and live down near the Al Fresco Park, and was living there when the Al Fresco property burned, I was asleep when the fire occurred. I remember of being out in the yard with my mother and seeing the car she has testified about. It came around by the edge of the willows and stopped. I did not see it when it came from the direction of the Al Fresco Park. It was dark and the lights were on. It stood there for a little while. I did not see [fol. 120] anybody get out of the car. I did not see it when it went away."

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CARL MANNERUD, produced by the prosecution, testified: "I live in Sioux Falls and have lived there for thirty-one years, and am in the shoe business. I know Judge Lewis Larson of the County Court,

we belong to the same church and worked together in several things. (438.) I know George Egan, and I remember when he had his preliminary hearing in County Court before Judge Larson. I had conversation with him prior to the hearing, it was after the case had been started and before the hearing, I think I said something about Judge Bergh acquitting him, or something of the kind. He asked me if I was friendly with Judge Larson, and he asked me if I would ask Lewis Larson not to be influenced by his political enemies because he was going to be tried before him, that all he asked was a fair and square trial, that was about the sum and substance of what he said." (439.)

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FRED MUNCE, re-called by the prosecution, testified: "It was on the 6th of November, 1919, (441) that I hauled the property. I think it was three radiators to 12th and Phillips Avenue, near where Mr. Egan was building his garage.

Cross-examination by Mr. Egan:

"There was no secrecy about the hauling."

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[fol. 121] CHARLES DAVIS, produced by the prosecution, testified: "My name is Charles Davis. (442.) I live in Sioux Falls and am a mechanic. I know the Al Fresco Park property. I was there and helped to finish the wrecking of the dance hall for about four days. I remember the time of the fire out there. (443.) That day I was helping to do carpenter work on Mr. Egan's building northwest about three-quarters of a mile from the Al Fresco property. I saw three teams going that way, they were coming west from the main road, and turned and went south on the Al Fresco road, (444) and went down to the road that leads directly past the Al Fresco Park. I was not able to see them clear through, I could not tell whether they were loaded or empty. They were two hay racks and a box wagon, I think. They were out of sight about three-quarters of an hour behind the grove, and when I saw them they were half way back on the road leading north. (445.) They turned and went toward Sioux Falls." (446.)

Cross-examination by Mr. Egan:

"It is nothing unusual to see teams on that road. It is a road traveled by practically everybody going south or southwest. The road west of the Al Fresco Park was always soft and muddy because of the [fol. 122] high willows, and the road east was graveled and everybody drove there. (446.) After a team got behind the trees for the first two or three or four hundred yards north of the Al Fresco Park, you could not tell where I was where it went. While I was working there I saw lots of teams hauling corn stalks and straw around that road, there was nothing about it that attracted special attention. I saw lots

of hay racks and wagons and teams go along there before. I did not see Egan there. (447.) I was one of the three men who took the rafters down on the dance pavilion. They were put on there by a 2 x 6 attached against the building, and the rafters put on top of that. There were no holes cut in the side of the building, or any siding torn off." (448.)

Redirect examination by Mr. Waggoner:

"When I say the road east and west of the Al Fresco buildings was soft and muddy I refer to wet weather; during dry weather it was dry, but it was full of chuck holes so that people did not travel very much on it, and most of the traveling was practically east of the building." (449.)

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F. C. SHERMAN, produced by the prosecution, testified: "I live in Sioux Falls and am in the insurance business. (449.) I know George Egan. I saw him the morning after the Al Fresco fire on the [fol. 123] sleeper coming to Sioux Falls from Sioux City. I asked Mr. Egan whether he had ever moved the dance hall from the Al Fresco Park building and he told me he had, and he said he was glad he had as he got a nice pile of lumber from it that he could use. I asked him what he meant by that, and he said the building had burned up the night before. (450.) I asked him how much insurance he had on the property, he said he could not tell exactly, until he got home, but if an application which he had given to Mr. Cogley had been accepted he would have fifteen thousand dollars, if it was turned down he would have twelve thousand five hundred. As I recollect he made the remark that it seemed that people seemed to have it in for him, burning up his property so rapidly, or words to that effect." (451.)

Cross-examination by Mr. Egan:

He said the reason he was hurrying home was that he got a telephone that his building had burned down. A little later I came over to his office and asked to see his policies and he handed them all over to me. At that time I stated to him that he had one policy that I knew nothing about." (451)

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ALBERT BOON, produced by the prosecution, testified: "I live in South Sioux Falls about a mile and three-quarters from the Al Fresco building. I was home the night of the fire. I did not go clear over [fol. 124] to the fire. When I first saw it the walls were all standing yet, and the rafters were just starting to fall. The fire was burning from the inside. I got within one-half or three-quarters of a mile to it." (452)

MARTIN MONSON, produced by the prosecution, testified: "I live in Sioux Falls and have for thirty-five years, doing carpenter work mostly. (453) I helped put up the rough work on the Al Fresco building in '89, and know in a general way as to how it was constructed. I was out there after the fire and took some measurements of the old joists and sills and the foundation and so on. Also the height of the basement, and width of the walls. There were pieces of the burned timber left, and part of the old sills. The sills are what is commonly called box sills made out of two pieces of 2x10 nailed together. The joists were sixteen inches apart from the center. We found some pieces of the sills which were marked with a carpenter's pencil, they were 2x10 in the first floor. The foundation was from eighteen to twenty-one inches thick (455) The sill was seven feet six inches, and joists above. The dimension lumber was number 2 pine, Norway pine and white pine mixed, 2x4 studding all the way through. The joists on the second floor were 2x10, the [fol. 125] rafters were partly 2x6 and 2x4. (456) It was a plain whit-pine finish. At the time this building was constructed, there were built in the locality o woolen mill, starch factory, and soap factory, and a store and several dwellings. (457) The woolen mill and one other is still there, and the rest were moved away. This Al Fresco building was originally for a hotel." (458)

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H. R. WHITEHOUSE, recalled for further cross-examination testified (461) "In regard to Exhibit No. "12," the policy of the Firemen's Insurance Company of Newark, New Jersey, I had a talk with Egan about what property the policy should cover, before it was written. (461) Mr. Egan asked me to write an insurance policy on the property, and I told him I couldn't write any insurance as long as the dance hall and restaurant were conducted out there, he said there isn't going to be and dance hall and restaurant conducted out there any more, that he was going to tear them down and was going to remodel it into a summer home. Mr. Egan asked me if it would be necessary for him to put the agreement that he would tear down the dance hall in writing, and I told him I did not think it would be necessary, but he could if he wanted to, and he did put it in writing, and I mailed it to the company with my [fol. 126] daily reports. (463) I think Exhibit "C" is a copy of the letter that Mr. Egan gave me that I sent to the Company. I sent it to the Company on September 6, 1919."

Defendant offers in evidence as part of the cross-examination, Exhibit "C" which is as follows: (Copy of letter addressed to the Firemen's Insurance Company of Newark, New Jersey, and F. C. Whitehouse and Company of Sioux Falls, South Dakota, dated September 6, 1919, stating that Mr. Egan had made application for twenty-five hundred dollars worth of insurance on the property in question, and that the agent had advised him that the rate would be reduced as soon as he moved the dance pavilion and discontinued

the restaurant, which he had agreed to do. That with the dance pavilion and restaurant removed and the place remodelled he thought he should have the reduced rates as farm property. Stated also that he had the property personally inspected to ascertain its value, and that the estimate was thirty thousand dollars, and he expected to get all the insurance he could on his property, and for that reason the difference in rate would be very material to him. And stated further that this letter was written in accordance with an agreement with Mr. Whitehouse). (1449) (464)

**Examination by Mr. Waggoner:**

[fol. 127] "I do not believe a copy of Exhibit "C" was sent to the other companies which I represented. (466) I think there was a letter sent to the Rhode Island Company, but it was a different letter. I would say that Exhibit "C" was the copy sent to the Firemen's Insurance Company." (467)

**Mr. Egan continuing:**

"I told Mr. Egan we could not write a policy if the dance hall and the restaurant were to be conducted (471) and he said he would remove them."

**Defendant re-offers Exhibit "C." (474)**

**Re-direct examination by Mr. Waggoner:**

"The signature at the bottom of State's Exhibit "39," is George W. Egan's and that was delivered to me on the 17th of October, 1919, and sent to the Rhode Island Insurance Company by me."

State offers in evidence Exhibit "39" as part of the re-direct examination, (478) which Exhibit is as follows: (Letter dated October 17, 1919, addressed to Whitehouse and Company, Sioux Falls, signed by defendant. Stating that defendant desired to increase his insurance on the property in question, and that Mr. Snitkey of the firm of Carlson and Snitkey was down and looked over the premises [fol. 128] with a view of making alterations and changes, and Mr. Snitkey valued the building at at least twenty-eight thousand dollars, and agreeing that the building would no longer be used as a dance hall and restaurant, but as a farm residence, and asking for the insurance at farm rate). (1108)

Defendants excepts and objects as being prejudicial, long subsequent to the policy that is in question, and not being proper, being immaterial, irrelevant and incompetent, having nothing to do with the policy, and calling attention to an entirely different and separate company; for the reasons so urged and for the further reason that the defendant is entitled to be confronted by the witnesses, and this is pertaining to another policy subsequently issued, and the defendant is not prepared to try but one case at a time. And for the further reason, an attempt to impeach their own witness, being irrelevant, incompetent, immaterial and being a long time subse-

quent to the issuance of the policy and a separate and distinct policy from the one on which the defendant is placed on trial, and no proper foundation is laid. Objection overruled and Exhibit received. (478)

"I saw State's Exhibit "40" before at the former trial. The signature on the first page is George W. Egan's, and the signature on the [fol. 129] second page under date of January 10, 1920, is Egan's, and on the third page, which is the formal proof of loss, is George W. Egan's signature. The signature on the formal proof of loss was made in my office, (479) and sworn to before me. The formal proof of loss, I believe, is in about the same condition now as when signed on January 9, 1920. The signature on the sticker which starts, 'One building 40x60 on ground' is George W. Egan's. (480). In Exhibits "41," "42," "43," "44," "45," "46," "47," and "14," the signature on the first two pages of each of the Exhibits is that of George W. Egan, and the formal proof of loss constituting the last two sheets and the sticker attached to such Exhibit and the schedule "B" were made out in the same manner as Exhibit "40," about which I have testified. (481). The signature on the first page of all of those Exhibits is that of Mr. Egan's, and the signature on the second page on each one of those Exhibits under date of January 20th is the signature of Egan's. And the signature at the bottom of the formal proof of loss of each one of these Exhibits is George W. Egan's, and each one of those signatures on the formal proof of loss in all of these Exhibits was signed by the defendant on the 9th day of January, 1920, in my office before myself as Notary Public. The signature on the [fol. 130] stickers on the back of each of these Exhibits is George W. Egan's." (482).

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JOHN B. LEE, produced by the prosecution, testified: "My name is John B. Lee, and I am in the insurance adjusting work, and live at Minneapolis. I have had no authority in this case. I have been investigating on behalf of the Palatine, United Underwriters, Northwestern National, Firemen's Fund, North British and Mercantile, Firemen's Insurance Company, Rhode Island Company and the United States Fire Insurance Company. (1829). Exhibit "C" (Note No. 45 in this trial) was received by me from the vice-president of the Firemen's Insurance Company, New York, Mr. Bassett of Chicago, shortly after January 12, 1920, also the supplementary proof bearing date of January 20th, was also received by me from Mr. Bassett shortly after the date it bears. Exhibits "L," "M," "O," "E," "I," and "R" I have seen before. I got some of them from the Home Office and others from the General Managers of the Company." (1830).

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HENRY WILSON, produced by the prosecution, testified: "I live in Sioux City, Iowa, and am a Claim Agent for the Firemen's Insurance Company. (1994). Exhibit "N" I received from the Western Department of the Insurance Company of Rockford, Illinois." (1995).

[fol. 131] State offers in evidence Exhibits "14," "40," "41," "42," "43," "44," "45," "46," "47," which Exhibits are as follows:

Exhibit "14" first page is as follows: (January 10, 1920; Security Insurance Company, T. W. Sexton Company, Agents, Sioux Falls, South Dakota. Gentlemen: As a precautionary measure I am handing you herewith in more elaborate and specific proof of loss, estimate of cost of rebuilding and general information so far as I am able to give it, in connection with the destruction by fire of my building on which you held insurance, November 24th, 1919. The facts and figures with reference to the cost of re-building are based on my best knowledge, information and belief, and all the estimates are very conservative, under present conditions. For example, I have estimated for re-building, using the same material for dimensions etc. as was in the original building; the original building was built in all dimensions stuff of white pine, sills were 6 x 12, and all partitions were built of 2 x 6's; especially strong reinforced and so substantial that after the years that it has stood upon inspection by experts, it was pronounced to be in an excellent state of affairs. The basement being already dug, it is not necessary to figure only the re- [fol. 132] placement of foundations and cross partition foundations; all of these were built of Sioux Falls granite and very substantial, but the fire destroyed the usefulness of the same; the building was piped for steam and contained a reservoir tank for supplying the house with water, for toilet and bath purposes; these last two items were not figured by Carlson-Snitkey Co. as I am advised by Mr. Snitkey in their estimate, placing the cost of rebuilding at \$27,800.00. I trust that this will furnish you all the information which you may deem desirable; I fully realize that you already have it in different forms, as I supplied to Mr. F. C. Sherman, State Agent for the Northwestern National Insurance Co., all of these facts and they were by him, as he informed me, communicated to the other companies, holding policies on the premises. I earlier supplied you with proof in the form of the estimate of rebuilding and the amount of damage by total destruction as prepared by Carlson-Snitkey, well known building engineers of this city. I do not intend by furnishing you this additional proof to waive any of my rights, to stand upon my records, which I have heretofore made but I am desirous of having the matter closed up, and having you rebuild my buildings or pay for the same. It is immaterial to me what you do, so you get at one of them. I [fol. 133] shall be glad to comply with your request for any other or further information. Respectfully yours, George W. Egan.

(1386) Second page of Exhibit "14," is as follows: Formal proof of loss made to the Security Insurance Company, dated January 9, 1920, signed by George W. Egan before Whitehouse as Notary Public, stating among other things that the first floor was occupied as a dwelling and the second and third floors unoccupied. That the cause of the fire was unknown. That the sound value was thirty thousand dollars, total insurance twenty-seven thousand five hundred. Amount named in this policy three thousand two hundred and fifty

dollars. Amount claimed in this policy three thousand two hundred and fifty dollars). 1387-1388)

Exhibit "40" is as follows. (First page: January 20, 1920, Firemen's Fund Insurance Company, Knowles, Dwight and Barnett, Agents, Sioux Falls, South Dakota. Gentlemen: Supplementing the several proofs heretofore made of my loss, I give you this information. Policy in your Company No. 959348. Amount due under policy \$2,500.00. Property totally destroyed. Date of total destruction November 24, 1919. Value of property \$30,000.00. Cause of fire unknown. Discovered between 10 and 11 o'clock in the evening. Amount of other insurance held on building, \$25,000.00. [fol. 134] Size of building, cost of reconstruction according to best information of the undersigned, would be, at least, \$30,000.00. Specific statement of same having heretofore been supplied to your agents and by your agent forwarded to you. At all times I have been ready to accept from you the rebuilding of my summer home and farm residence which was destroyed and on which you carried this policy. Up to the present time you have both failed and refused to pay for same or to rebuild it. That according to proof heretofore furnished, the undersigned owned this property and title fee save and except only mortgage of \$2,300.00 to Dennis & Dennis or Roger L. Dennis, all of which appears in your records and which you have heretofore acknowledged. Other companies insured in are: Rhode Island Ins. Co., United States Fire Ins. Co., and North River Ins. Co., Firemen's Ins. Co., of Newark, North British and Mercantile Ins. Co., Security Insurance Co., Palatine Ins. Co., United States Fire Ins. Co. Respectfully submitted, George W. Egan. State of South Dakota, County of Minnehaha, ss. Subscribed and sworn to by George W. Egan, before me this 20th day of January, 1920, Charles H. Bartelt, Notary Public, Minnehaha County. (1390) The second page of this Exhibit is a letter dated [fol. 135] January 10, 1920, addressed to the Firemen's Fund Insurance Company, Knowles, Dwight and Barnett, Agents, Sioux Falls, South Dakota, and is the same as the letter attached to Exhibit "14," heretofore set out (ante pp. 80-82). The third and 4th pages of this Exhibit are the formal proofs of loss, stating the first floor occupied as a dwelling. Second and third floors unoccupied. Cause of fire unknown. Sound value to be \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named in this policy \$2,500.00. The amount claimed under this policy \$2,500.00. Signed by George W. Egan before Whitehouse on the 9th of January, 1920, as Notary Public). (1393)

Exhibit "42": (First page of this Exhibit is letter dated January 20, 1920, (1395) addressed to the North British and Mercantile Insurance Company, T. W. Sexton, Agent, Sioux Falls, South Dakota, and is the same as the letter attached to Exhibit "40." (Ante pp. 82-83). The second page of this Exhibit is a letter dated January 10, 1920, addressed to the North British and Mercantile Insurance Company, T. W. Sexton, Agent, Sioux Falls, South Dakota, signed by the defendant and is the same as letter

attached to Exhibit "14," (Ante pp. 79-82). (1396) The third and fourth pages of this Exhibit are the formal proofs of loss to [fol. 136] the North British and Mercantile Insurance Company, made on January 9, 1920, before H. R. Whitehouse, Notary Public, stating the first floor occupied as a dwelling. Second and third floors unoccupied. Cause of fire unknown. Sound value \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named in this policy \$5,000.00. Amount claimed under this policy \$5,000.00). (1397-1398)

Exhibit 42: (First page of this Exhibit is a letter dated January 20, 1920, addressed to the Palatine Insurance Company, Hollister Brothers, Agents, Sioux Falls, South Dakota, signed by George W. Egan and is the same as the letter attached to Exhibit "40.") (Ante pp. 82-83). (1401) (Second page is letter dated January 10, 1920, addressed to the Palatine Insurance Company, Hollister Brothers, Agents, Sioux Falls, South Dakota, and is the same as the letter attached to Exhibit "14.") (Ante pp. 80-82). (1402) (The third and fourth pages are the formal proofs of loss to this company, stating the first floor occupied, second and third floors unoccupied. Cause of fire unknown. Sound value \$30,000.00. Total insurance \$27,500.00. Amount named under this policy \$5,000.00. Amount claimed under this policy \$5,000.00. Made on January 9, 1920, before H. R. Whitehouse, Notary Public). [fol. 137] (1404)

Exhibit "43": (First page of this Exhibit is a letter dated January 20, 1920, addressed to the United States Fire Insurance Company and the North River Insurance Company, S. R. & Roy Nugen, Agents, Sioux Falls, South Dakota, and is the same as the letter attached to Exhibit "14.") (Ante pp. 80-82.) (1406) (The second page is letter dated January 10, 1920, addressed to the United States Fire Insurance Company and the North River Insurance Company, S. R. & Roy Nugen, Agents, Sioux Falls, South Dakota, signed by the defendant, and is the same as letter attached to Exhibit "14.") (Ante pp. 82-84.) (1407) (The third and fourth pages of this Exhibit are the formal proofs of loss to this company, stating, first floor occupied, second and third floors unoccupied. Cause of fire unknown. Sound value \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named in this policy \$2,500.00. Amount claimed under this policy \$2,500.00. Signed by defendant January 9, 1920, before H. R. Whitehouse, Notary Public.) (1409)

Exhibit "44": (First page of this Exhibit is letter dated January 11, 1919, addressed to Rhode Island Insurance Company, F. C. Whitehouse & Company, Agents, Sioux Falls, South Dakota, signed [fol. 138] by the defendant and is the same as the letter attached to Exhibit "14.") (Ante pp. 82-84) (1411) (Second and third pages are formal proofs of loss stating, first floor occupied as dwelling, second and third floors unoccupied. Cause of fire unknown. Sound value \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named under this policy \$2,500.00. Amount

claimed under this policy \$2,500.00. Signed by defendant before H. R. Whitehouse, Notary Public, on January 9, 1920.) (1413)

Exhibit "45": (First page of this Exhibit is letter dated January 20, 1920, addressed to the United States Fire Insurance Company, George McDonald, Agent, Sioux Falls, South Dakota, and is the same as letter attached to Exhibit "14.") (Ante pp. 80-82.) (1435) (Second page is formal proof of loss to this company, stating, first floor occupied as dwelling. Second and third floors unoccupied. Cause of fire unknown. Sound value \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named in this policy \$2,500.00. Amount claimed under this policy \$2,500.00. Signed by defendant before H. R. Whitehouse, Notary Public, January 9, 1920.) (1436)

Exhibit "46": (First page of this Exhibit is letter dated January [fol. 139] 20, 1920, addressed to Firemen's Insurance Company, F. C. Whitehouse and Company, Agents, Sioux Falls, South Dakota, signed by the defendant, and is the same as letter attached to Exhibit "14.") (Ante pp. 80-82.) (1440) (Second page of this Exhibit is letter dated January 10, 1920, addressed to the Firemen's Insurance Company, F. C. Whitehouse and Company, Agents, Sioux Falls, South Dakota, signed by the defendant, and is the same as letter attached to Exhibit "40.") (Ante pp. 82-84.) (1441) (Third and fourth pages are formal proof of loss to this company, stating, first floor occupied as dwelling. Second and third floors unoccupied. Cause of fire unknown. Sound value \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named in this policy \$2,500.00. Amount claimed under this policy \$2,500.00. Signed by George W. Egan, before H. R. Whitehouse on January 9, 1920.) (1443)

Exhibit "47": (First page of this Exhibit is letter dated January 15, 1919, addressed to the Northwestern National Insurance Company, Milwaukee, Wisconsin, Knowles, Dwight & Barnett, Agents, Sioux Falls, South Dakota. Gentlemen: My property insured under this policy for \$2,500.00, was totally destroyed by fire November 24, 1919, since I have heard nothing from you, I am handing you [fol. 140] herewith proof of loss, and—Making formal demand for payment under said policy. Signed George W. Egan). (1415) (Second page is letter dated January 20, 1920, addressed to the Northwestern National Insurance Company, Knowles, Dwight & Barnett, Agents, Sioux Falls, South Dakota, signed by defendant and is same as letter attached to Exhibit "14.") (Ante pp. 80-82) (1416) (Third page of this Exhibit is letter dated January 10, 1920, addressed to Northwestern National Insurance Company, Knowles, Dwight & Barnett, Agents, Sioux Falls, South Dakota. Signed by defendant and is the same as letter attached to Exhibit "40.") (Ante pp. 82-84) (1418) (Balance of this Exhibit is the formal proof of loss to this company, stating, first floor occupied as dwelling. Second and third floors unoccupied. Sound value \$30,000.00. Total loss \$30,000.00. Total insurance \$27,500.00. Amount named in this policy \$2,500.00. Amount claimed under this policy \$2,500.00. Signed on January 9, 1920, before H. R. Whitehouse, Notary Public).

Mr. Egan: To all of which offers the defendant objects and exceptions on the ground that the same is incompetent, because it has not been properly identified; defendant hasn't been confronted by the witness. It is immaterial and irrelevant and not proper testimony [fol. 141] money in this case, purporting to be proofs of loss filed in other cases, different from the Firemen's of Newark, New Jersey, on which the defendant is placed on trial, and is seeking to try seven or eight cases against the defendant at one time, and being prejudicial to the defendant, in that the documents are confusing and the defendant has no way of preparing a defense against the matters and things set up in said proposed Exhibits, each one constituting a separate case like unto the case which is sought to be made against the defendant; and that to admit them would be incompetent and prejudicial and irrelevant and immaterial. And that fastened to each of said proposed Exhibits and being no part thereof originally when the same were prepared, are letters, personal communications which are incompetent and are no part of the case against the defendant at this time. Objection overruled. Exception allowed. Exhibits received. (483)

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T. W. SEXTON being recalled for further cross-examination, examined by Mr. Egan, testified: "Before I wrote the first policy for Mr. Egan, I had a talk with him. Mr. Egan stated that he wanted to place an insurance policy on the property for five thousand dollars, and I informed him that the rate as a restaurant and pavilion was [fol. 142] \$1.63 for a year, and he told me that the restaurant and dance pavilion were to be discontinued, that he was going to remove them (484), then I told him that it would be written at the regular farm residence rate. I asked him if the farm house was occupied now, and he said by his tenant, and I said I would write it as farm residence which I did. I wrote the rating immediately that the restaurant and dance pavilion were to be discontinued." (485)

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LOUIS F. SMITH, produced by the prosecution, testified: "I live in Rapid City, but practically all of my life I lived in Sioux Falls, my business was principally farming, but I sold land for three or four years. (486) I was familiar with the Al Fresco Park property, and at one time owned it. (487) I owned the building when the dance hall was put on, and built the dancing pavilion. I know the value of real estate in and around Sioux Falls, and I think I know what this Al Fresco Park property was worth. I sold and bought real estate."

Q. Assuming that since you had left this property there had been removed from the building about a dozen or fifteen steam radiators which had previously been connected up with the steam plant and used in the building, and that the bath tub and sink

which were formerly on the second floor had been removed, what [fol. 143] then would you say was the value of this building, the main part of it exclusive of the radiators and bath tub, the sink and the dance pavilion, reasonable market value on the 24th of November, 1919, located where it was at South Sioux Falls?

The question is objected to as being incompetent because it does not include the proper elements upon which an opinion of any weight might be based, and the witness is objected to as being incompetent because the record does not show that this witness knows anything about the size of the building, number of rooms, manner in which it was finished; and the further objection that it wouldn't be a proper measure of value just the building standing there, but it would be necessary to consider the property that went with it, its general location, the purpose for which it was being used in the business affairs of life, and not what the man would give for it, but what a man would take for it that wanted to sell it, would be the real standard measure of value, the witness is incompetent. Objection overruled and exception allowed.

A. "I would say Thirty-five Hundred Dollars. (494) The building was built about thirty years ago for a hotel."

Cross-examination by Mr. Egan:

[fol. 144] "I would say the radiators and the sink were worth four or five hundred dollars." (496)

Mrs. ELSA CROMM, produced by the prosecution, testified: "I live about five and a half miles southwest of Sioux Falls, and am farming. (505) That is the farm where this new set set of buildings was built, or commenced in the year 1919. The barn, garage and those buildings. We lived there at the time of the fire in September, 1919."

Cross-examination by Mr. Egan:

"Mr. Egan had not taken possession of the farm at the time the barn burned, and did not until the following March, it belonged to Mr. Dennis."

Mr. Egan: I now renew the objection, as being irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues.

Mr. Waggoner: We will prove to the Court that he did own the property.

By the Court: If you can connect it up you can introduce this evidence now.

Mr. Waggoner, continuing:

"This barn was an old starch factory that had been cut down and used for a barn, and Egan bought the farm while we were

living on it, before the first of September. On Labor Day, the first of September, I came down to see the parade. Nobody was [fol. 145] home when I left, I came back about four o'clock." (507)

Q. "What had happened?"

Objected to as incompetent, immaterial, and irrelevant. Objection overruled. Exception allowed.

A. "It had burned down."

Defendant moves to strike from the record all the testimony of this witness for the reasons stated in the objection, and re-iterating here that it is incompetent because it is irrelevant and immaterial to the issues in this case. Motion denied. Exception allowed. (508)

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LOUIS CROMM, produced by the prosecution, testified: "I lived on the Egan farm testified about by my wife. On Labor Day, 1919. That was the farm on which the building known as the old starch factory was located. That was used for a barn."

Q. "Did Mr. Egan buy that property out there?"

Objected to as incompetent, the witness is incompetent, how could he know whether I bought it or not. Overruled. Exception allowed.

A. "I understood he had control of it. (509) He owned the property as he expressed himself, before the barn burned. On Labor Day I was baling hay on the south side of the farm about three-quarters of a mile from the barn, but not in sight of the barn. [fol. 146] Besides my wife and child and the farm help, I had a brother living on the place. (509) This brother and my hired man were working with me and there was nobody at the house that day."

Q. "What was the first you saw relative to the fire?"

Objected to as irrelevant, incompetent, immaterial, the witness incompetent. Objection overruled. Exception allowed.

A. "Why my cousin he went upon a hill up from the river way and he saw the smoke and he called to us." (510)

Q. "And then did you go up there?"

Same objection. Overruled. Exception allowed.

A. "Yes, sir. The first I saw was the smoke."

Q. "And probably figured that it was coming from the direction of your property, and went over?"

Objected to as incompetent, as to what he figured. Overruled and exception allowed.

A. "Yes, sir. (510) One of the boys had his car over there and we got in the car and drove over to the fire. (511) There was nothing I know of that that fire could have started from." (512)

Cross-examination by Mr. Egan:

"I was on the farm and doing the regular work. (514) People fished along the river, and by the barn sometimes, and there was nothing to keep them from going into the barn." (515)

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[fol. 147] J. L. STOWE, produced by the prosecution, testified: "I live about five miles from Sioux Falls on a farm, (515) and formerly I lived on the farm where the old starch factory was located, for two years, about eight years ago. I know the barn that is referred to called the old starch factory, and how it was constructed, and at one time figured up the cost of replacing it with another barn or building. (516)

Q. "And do you know Mr. Stowe the reasonable value of that barn known as the old starch factory at the time that it burned up on Labor Day in 1919?"

Objected to as incompetent, and the witness is incompetent. Objection overruled. Exception allowed.

A. "About thirty-five hundred." (517)

Cross-examination by Mr. Egan:

"The barn was made of pine lumber and was about 80 x 100 feet. The floor joists were 2 x 12, the corner posts were 12 x 12 16-feet long, heaviest timber I ever saw in a building. (517) Flooring on the second floor was an inch and a half in thickness, four inches wide." (518)

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G. E. STOWE, produced by the prosecution, testified: "I live south of Sioux Falls, on the river, and formerly lived on the property now owned by Mr. Egan which burned on Labor Day, 1919. (1978) [fol. 148] At one time we were the owners of this farm, and paid \$88.00 an acre for it. (1978) I don't keep much track of real estate. I could not tell you the size of this barn off-hand. I know in a general way how it was constructed, and its condition. I don't know whether I could say yes or no to whether I knew what the value of the barn was, I know what we figured that barn was worth at the time we figured on tearing it down and building a new one."

Q. "In your opinion, what was this barn worth in 1919 for the purpose for which it was used, for the purpose it was used?"

Objected to as being incompetent, irrelevant and immaterial to the issues here joined, immaterial and hearsay.

Objection overruled and exception allowed.

A. "Thirty-five hundred is what we valued it at because we were going to tear it down and remodel it." (1979)

## Cross-examination by Mr. Egan:

"I do not know anything about the size of the barn or the height of it. I know that it was the strongest constructed building I ever saw, and the material was the heaviest I ever saw used." (1980)

Mr. Egan: Now after reading the cross-examination of the witness, admitting that he had no foundation on which to base his opinion, defendant moves to strike the evidence from the record on all the [fol. 149] grounds in the objections at the time it was offered, and the additional ground that the cross-examination shows the witness was incompetent, knew nothing about the size of the barn or the dimensions of it, couldn't possibly know the reasonable market value at that time for its use, that would be the test. Motion denied. Exception allowed. (523)

W. A. SLOAN, produced by the prosecution, testified: "I live in Sioux Falls, and am chief of the Fire Department, and know George W. Egan. I know about the fire that occurred on Labor Day, 1919. I know of the Al Fresco fire (524) and of a house on Fifth and Spring in Sioux Falls and of a fire at 327 North Phillips Avenue in 1919. (525) I made an investigation relative to the barn that burned, which was located on the Egan property, as to how much, if any, insurance was carried. There was Eighty-five Hundred dollars worth of insurance." (528)

## Cross-examination by Mr. Egan:

"In regard to the fire at the corner of Fifth Street and Spring Avenue in one of Mr. Egan's houses, that building was being cleaned up, (527) and remodelled and new plumbing put in, at that time I found some polishing materials and oils, and cloths, by the side of the stairway, like they had been wiping up. The fire was put [fol. 150] out. It started in the stairway and burned out to the back door. (528) My conclusion was that the fire was from spontaneous combustion from the paints and oils. Regarding the fire on North Phillips Avenue, this was caused from a chimney from a building adjoining, and did not start in Mr. Egan's building at all. (529) I went down to the Al Fresco Park the night of the fire, and I saw the straw on the premises about twenty-five feet north of the building. (532) It was old straw. There was no evidence that it had been recently moved. I know nothing about the fire down at the barn." (532)

## Redirect examination by Mr. Waggoner:

"This straw looked to me like it had been laying there for some time without being moved. It had been kind of packed down." (533)

A. J. JULSON, produced by the prosecution, testified: "I have lived in Sioux Falls a little over fifteen years, and am in the boiler makers trade. I knew the Al Fresco Park property and at the request of the officers made an inspection of the boilers that were down there in the basement of the building after the fire. I have had some experience in examining the effects of fires and the different degrees of heat. (535) I never inspected these boilers before the fire. I took a hammer with me and drove my hammer through [fol. 151] the front head of the boiler in one blow. It had been built for thirty years. The intense heat was strong enough to chrystal-ize steel, these were steel furnaces and boilers that was bricked in, had no value at all, and the other boiler the grates were all burned out of it, had been and I don't know for how long. They had been burned out from internal fire and not from the burning of the building." (538)

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A. D. FELLOWS, produced by the prosecution, testified: "I live in Sioux Falls and am a carpenter. I built the dance pavilion on the Al Fresco building for Louis Smith. (540) The dance hall was thirty feet wide." (541)

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S. B. DEWEY, produced by the prosecution, testified: "I live in Pipestone, Minnesota. (1837) I formerly owned what is known as the Al Fresco property in 1918. (1838) I sold it to Egan." (1839)

Q. And what was the purchase price?

Objected to as incompetent, irrelevant and immaterial as to value, not tending to establish any value the only measure of value is what a piece of property is worth to the man who wants it. Objection overruled and exception allowed.

A. "Why I think it figured to sixty-eight hundred or seven thousand dollars." (1840)

State offers in evident Exhibit "48," (which is an extract of an [fol. 152] affidavit signed by Egan in the case of Charles McDonald vs. George W. Egan, stating that on April 15, 1911, Mr. Egan had caused said land (Buffalo County) without describing it to be examined and for the first time discovered that the statements and representations made by McDonald were false and untrue.) Defendant objects on the ground that it is irrelevant, incompetent and immaterial to any issues here joined, and further that it shows that it was made eighteen months prior to the date the defendant desires to know the value of the land, would be incompetent. (546)

CLARENCE E. DOWLING, produced by the prosecution, testified: "I live in Sioux Falls and am acquainted with the Al Fresco Park property and once owned the property. (548) The building was in poor condition, plaster off the walls, and the north door was fastened with a spike. I don't recollect any windows gone, some were broken. (549) I had it listed for sale and finally disposed of it, (550) in March, 1919."

Q. Now I am going to ask you again, Mr. Dowling, what was the reasonable market value of this property as it was located there and in the condition that it was in at that time. (Referring to the date witness owned the property.)

Objected to as incompetent, and the witness being incompetent, [fol. 153] no proper foundation made, the witness not showing himself competent to express a guess or opinion, the defendant demanding the right to be confronted by competent testimony of architects, men who know instead of taking a man who knows nothing about it. Objection overruled and exception allowed.

A. "Does that include the land?"

Q. "Yes.

A. "My estimate was about nine thousand dollars." (554)

A. K. HANSON, produced by the prosecution, testified: "I live at Sherman, South Dakota, used to be in the banking business and did some real estate business. At one time I owned the Al Fresco Park property and sold it about the middle of May, 1919. I know something about the building of property and have had a little experience."

Q. Tell the Court in your opinion what was the reasonable value of what is known as the Al Fresco?

A. "You mean in its present condition?"

Q. "Yes, when you saw it along in May?"

Objected to for the reason no proper foundation laid, witness incompetent, therefore irrelevant and immaterial. Objection overruled, and exception allowed.

A. "I figured out about thirty-seven hundred and fifty dollars." (556) (2019)

TOM HANSON, produced by the prosecution, testified: "I formerly owned what is commonly known as the Al Fresco Park property. [fol. 154] bought it in December, 1918, and sold it in the Spring of 1919." (556) 2009)

Q. "What did you get for this property when you sold it?"

Objected to as incompetent, irrelevant and immaterial to any issue in this case. Overruled, exception allowed. (2010)

A. "I realized, I think about seven thousand dollars."

Q. "What would you say, Mr. Hanson, was the reasonable market value of the property at that time?"

Objected to as incompetent, immaterial and irrelevant to any issue in this case. Objection overruled. Exception allowed.

A. "I figured between six and seven thousand dollars."

Defendant at this time moves to strike all of the testimony of the witness Hanson out for the reason that the same is incompetent, irrelevant and immaterial under the information charged in this case and as being incompetent, irrelevant and immaterial and prejudicial to the defendant, and ask the Court to strike it out. Motion denied, and exception allowed. (556) (2010)

F. L. CRANE, produced by the prosecution, testified: "I am a house moving contractor, and live in Sioux Falls. I know the Al Fresco Park property, and made an examination about three years [fol. 155] ago to ascertain what I would consider it worth. I ascertained how it was constructed and the size of the timber and the quality, and size of the building and the number of rooms. (2011) I have bought second-hand buildings in Sioux Falls.

Q. "Do you know the reasonable value of that building as it stood on the ground at South Sioux Falls last summer?"

A. "I think I do."

Q. "You may state."

Objected to as incompetent, immaterial and irrelevant, witness not qualified to give an opinion. Also objected to for the reason that it is immaterial and incompetent to the issues in this case. Already appears the building was a total loss. Objection overruled and exception allowed. (556) 2012)

A. "Twenty-five Hundred Dollars."

Cross-examination by Mr. Egan:

"I did not figure on the number of shingles it would require to cover the roof, nor the number of feet of lumber, nor the amount of work it would take to rebuild the building, nor the amount of lath, nor what it would cost to wreck it." (557)

State rests.

#### ARGUMENT OF COUNSEL

Permission given defendant to recall T. W. Sexton and Mr. Waggoner for further cross-examination later.

Mr. Egan: Now at this time at the conclusion of the testimony [fol. 156] of the State the defendant asks the Court to advise the

jury to return a verdict of not guilty on all the grounds stated in the original objection to the introduction in this case: First, that the information herein does not substantially conform to the requirements of the law as prescribed in Section 4771 of the Revised Code of 1919. Second, that more than one offense was charged in the information. Third, that the information does not describe a public offense. Fourth, that no venue is laid and that the Court is without jurisdiction in this case under the information filed herein. Fifth, that the information does not state facts sufficient to constitute a public offense under the laws of this State. Sixth, that the County in which the alleged offense is alleged to have been committed is not stated in the information, and that said information is defective in failing to lay the venue in order to give the Court jurisdiction. Seventh, that the State has wholly failed to make out a case against the defendant in the following particulars: (a) By having failed to prove the venue of the case. (b) By having failed to prove the delivery of the alleged proof of loss by the defendant to the insurance company. (c) By having failed to prove any of the elements of the crime charged, having failed to prove [fol. 157] a case under the statute as required by the laws of this State. (561) (d) That the State has wholly failed to show any criminal act or criminal conduct on the part of the defendant. (e) Has failed totally and completely to show that the defendant ever intentionally or wrongfully made out, executed or caused to be made out, delivered or caused to be delivered any false claim in support of proof of loss as charged in the information.

And that on all these grounds the defendant is entitled to have the jury advised by the Court to return a verdict in his favor.

The defendant does at this time move the Court to strike from the record the testimony of Mattie Lorenzen so far — it has anything to do with testifying to hearing an automobile stop and seeing the light of an automobile stop north and west of her house at least a quarter of a mile from the building and between eight and nine o'clock in the evening of November the 24th, for the reason that the same is irrelevant, incompetent and immaterial and does not tend to prove or disprove any of the issues in this case, and would cause the defendant necessarily if left in the record to try to answer the same in some way, to call witnesses in some way and thereby unnecessarily incur the record.

[fol. 158] And also the testimony of John Lorenzen, the little boy as he appears, that was read here, to the same effect, that he saw lights and heard an automobile between eight and nine o'clock at some out of a way place. This motion also extends to that part and portion of the testimony of Charles Davis in which he said he saw on the public highway teams going south and later going north, because the same is irrelevant, incompetent and immaterial and does not tend to prove or disprove any of the issues in this case, but left in the record does necessarily force the defendant to find some way by whatever competent testimony he may be able to find to answer the testimony. (252) Objection overruled and exception allowed. (563)

T. W. SEXTON, re-called for cross-examination by Mr. Egan, testified: "Referring to the policy issued at the time Mr. Potter was in my office when I came in and talked it over, Mr. Lalley gave me the information that Mr. Egan had given us another policy on his property. (564) I asked Mr. Lalley in the presence of Mr. Potter, when I came in, whether the insurance was on the main building, and Mr. Lalley and Mr. Egan replied that it was not gone yet. Mr. Lalley called my attention to the application showing that it described simply a two and a half story building 40 x 60. (565) I said to Mr. Egan in the presence of Mr. [fol. 159] Lalley, 'Have you taken down the dance pavilion yet?' I came into the office just a minute or two before Mr. Egan left the room, and Mr. Lalley and Mr. Potter were fixing up the application." (565)

#### Defendant's Case

R. C. HIRCHERT, called by the defendant, testified: "I live in Sioux Falls, am a contractor and builder and have been for fourteen years. I inspected the Al Fresco Park property before it burned down. I had four men who were wrecking the dance hall for Egan. This dance hall was fastened to the main building by 2 x 8's spiked to the building and rafters on top toenailed into the side. At the time of the wrecking I heard Egan and Henderson talking, Egan told Henderson to pick up all the blocks that he could have them and burn them up, and to put them away so that they would keep dry for use for his stove. (568) This lumber we took down was taken about three-quarters of a mile west from there and put in a barn, garage and hog house which Mr. Egan was building. (569) At the time this Al Fresco burned there were ten or fifteen kegs of eight-penny nails and six or seven kegs of sixteen-penny nails and four or five kegs of shingle nails, and around sixty or seventy gallons of white paint and some rope. (570) This building was 22 [fol. 160] inches wide on the foundation 8 feet 6 inches high, 44 feet south and north, and sixty feet east and west. Two cross walls 2 feet wide and 8 feet 6 inches deep. There were five rooms in the foundation of the building which were constructed of Sioux Falls granite. There were six windows and a stairway. (571) The walls were in good general repair outside of one room in the basement, some of the rooms had cement floors. The boilers looked like they were alright. There were five rooms on the first floor finished up. (573) At the time we were wrecking the building Mr. Henderson occupied one of the rooms down stairs. I know because he told me to stay out of one room because he had his goods in there, and I had no business in there. (574) The woodwork was all in general good condition. (575) Some of the walls were papered. The stairway was about 7 feet wide and in good condition. The plastering on the second floor was all in good condition so was the woodwork and the doors. The doors were all there when I was tearing down the dance hall. (576) There was some plastering off in two rooms on the third floor, not very much.

They were all in good general repair. (577) I would figure the building to be worth about \$32,000 at the time." (578)

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GEORGE W. EGAN (traveling man), produced by the defendant, [fol. 161] testified: "I live in Sioux Falls and am a traveling man. I am not related to the defendant. I know George R. Henderson, had a talk with Henderson in the presence of Mr. Dunkelburg and Mr. Riley on the first day of March, 1920, on the steps of the Cataract Hotel, about the burning of this building, at that time and place Henderson said in substance, 'Damn him if he does not pay me I will send him to the penitentiary.' And I asked him for what, and he said, 'For burning his building down there at South Sioux Falls,' and I asked him if he knew Egan had burned the building and he said that he did not. (636) And then I said to him, you better not make such statements as that, and he turned and walked away." (636)

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J. C. DUNKELBERGER, called by the defendant, testified: "I live at Sioux Falls, (636) and am farming, and I heard George W. Egan, (traveling man) ask George R. Henderson if the defendant had paid him his money yet and I heard George R. Henderson say that defendant hadn't paid him and that he was going to send him 'to the penitentiary for burning his building down at Sioux Falls,' and then I heard Mr. Egan (traveling man) ask him if he knew that Egan had burned his building and Henderson said he didn't [fol. 162] know."

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JOHN RILEY, called by the defendant, testified: (637) "I live at Sioux Falls and am a farmer, and I heard George W. Egan (traveling man) ask George Henderson if the defendant had paid him yet, and Henderson said that if Egan did not pay him he 'would send him to the penitentiary for burning his building,' and Egan asked him if he knew that Egan had burned the building, and Henderson said he didn't." (638-639)

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W. A. SNITKEY, called by the defendant, testified: "I live in Sioux Falls and am forty-four years old. Lived here for fourteen years, and am a general contractor. I have built four of the school houses in Sioux Falls, built the Coliseum, Orpheum Treatre, Albert Hotel, International Harvester Company and P. & G. Plow Company. I built the school houses that have been built since I came here and am building the new High School now. I know George Egan. In the late summer of 1919, I went out to the Al Fresco Park with him and inspected the building, and made an examination. (640) My purpose in examining the building was to rebuild it into a

summer home for Mr. Egan. I examined it and gave Mr. Egan an estimate of its value. I think it was ninety days before the building burned. (641) I told Mr. Egan the property was worth [fol. 163] \$30,000.00, which did not include the dance pavilion. (642) This building was 44 x 60 concrete foundation, cross-walls and foundation constructed out of Sioux Falls granite. The corner posts of the building were 24 feet, studding 2 x 6, and the outer walls 2 x 6 studding upon a supporting and sustaining partitions and cross walls, box sills, sills 2 x 10 O. C. sixteen inches, double floor on the first floor, covering of floor being white pine, all material in the building being white pine about twenty-three rooms *in the building, finish of woodwork white pine, roof or deck roof* what is called a gambrel roof, about fifty-three windows in the building, three doors on the south side leading outward, two doors on the north, the second floor having eleven rooms, third floor having five rooms, first floor having five or six rooms, on the first floor a room in the southwest about twenty by thirty feet, having a hard maple floor; taking into consideration the location of the building and keeping in mind the value of prices on the 24th of November, 1919, and my experience and training, I would say the building was worth, exclusive of the heating and plumbing in it, in the neighborhood of \$30,000.00 or perhaps more." (643-644)

Cross-examination by Mr. Waggoner:

"When I say the value is \$30,000.00, I mean the cost of reconstruction with new material. (644) I know Mr. Nichols, but I never told him that I did not know anything about what it would cost to rebuild the building, and that I did not go into details with Egan, and I did not tell him that I never gave Mr. Egan a statement in writing as to the value of the property, because I did give Mr. Egan a statement as to the value of the building, when I was out there. (649) I did not tell Mr. Nichols that I did not consider the sound value of the building to be more than \$7,500.00, I think that is the value that Mr. Nichols put on it himself. I did not tell Mr. Nichols that when I figured on the building for Egan that I substituted fir for pine, and that the total was not as much as Mr. Egan wanted it and then he, Egan, asked me to figure pine where pine was used and that I told him I could not get it except up in the woods, and he said, 'well that is what I want,' and I said well if you did it that way it would cost you more than \$28,000.00. (650) I never talked with Mr. Quigg, the Deputy Fire Marshal, about this Al Fresco job." (678)

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S. A. NASH, called on behalf of the defendant, testified: "I live in Sioux Falls, Minnehaha County, a little better than two blocks away from the Al Fresco Park building, west and across the street. (679) I have gone through the different rooms in the Al Fresco [fol. 165] building and the basement. I saw the building fre-

quently, after the dance hall was moved and before it burned down. (680) There were five or six rooms on the first floor in very good shape. Woodwork all intact and the plaster all on and in good shape, floors were all good, also the doors and windows and casings. (682) Third floor was good. I was home the evening the building burned. I have seen teams go back and forth on the public highway quite often, and there is nothing unusual about it. At the time and after the burning, teams were hauling straw, corn and other stuff down in the neighborhood of that country." (684)

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GEORGE HUGHILL, produced by the defendant, testified: "I live in Sioux Falls and am an architect, graduate from the Armour School of Chicago, and also took a course under the Beaux Art. I have done a lot of work in Sioux Falls, School houses, Fanfle Brothers building, McKennan Hospital, also schools at Humboldt, Mitchell and Aberdeen. (691) A building with a foundation as indicated by Exhibit "D" which is a drawing showing a foundation located at South Sioux Falls, dimensions being 44 x 60, the corner posts 24 feet, the roof gambrel, the dimension lumber being white pine, box sills, joists 2 x 10 O. C. 16 inches, first floor being a double floor soft pine, there being five or six rooms on the first floor, stair-[fol. 166] way leading from the first floor about seven feet in diameter, the stairway what is called a circular stairway, going part way up, changing, turning and going another way, reaching the second floor; second floor eleven rooms with doors and windows, white pine finish, white pine floor, single floor on the second floor; third floor five rooms, white pine flooring, white pine finish, in all the building about twenty-three or twenty-four rooms, fifty-three windows, and basing my answer upon my experience as an architect-*ture*. I would say the value on the 24th day of November, 1919, at South Sioux Falls would be from 32,000.00 to 35,000.00 dollars." (692)

Cross-examination by Mr. Waggoner:

"That would be the replacement value, and I am speaking of what it would cost to replace the building. (693) I have been an architect for twelve years. I have seen the plans of this building and have taken them into consideration in figuring my estimated value. (695) I figured it on cubic contents at 32 cents per cubic foot. There was about 107,000 to 110,000 cubic feet. (696) I took my dimensions from the plans. (697) I figured this building at a special rate of cubic contents cost, if I were to figure this building finished in oak, oak floors, mahogany or birch it would be a higher [fol. 167] contents, I think it takes fifty to fifty-five cents per cubic foot to build a first-class resident. This one was based on thirty-two cents per cubic foot. (699) Prices in material reached the peak along in January of the year 1919." (702)

ALBERT McWAYNE, produced by the defendant, testified: "I live in Sioux Falls, (707) and am an architect, and a member of the firm of Perkins and McWayne, had superintendency of the building of Shriver-Johnson building and the Y. M. C. A. (708) and the Augustana College. Looking at Exhibit "D" which is a rough sketch of a foundation with the dimensions of the walls and the size of foundation noted thereon and at Exhibits "52," "53," "54," "55," blue prints and assuming that the building was constructed on the foundation that was indicated on Exhibit "D" that the dimensions of the building 44 x 60, and located about four miles south of Sioux Falls and taking as my date November 24, 1919, building being constructed of white pine, first floor starting in with the sills and what are known as box sills, joists 2 x 10 O. C. 16 inches, first floor to be double floor of white pine, corner post 24 feet first floor five or six rooms with partitions, proper doors, south side three doors opening outward, two doors on the north side, stairway seven feet wide, second floor single white pine, eleven [fol. 168] rooms, all wood work white pine, doors and windows in good shape, third floor single white pine all woodwork white pine, five rooms on third floor, two chimneys extending down to basement, roof known as gambrel and basing my answer upon my experience and upon the value of building material at that time, it would cost about 30 cents per cubic foot, and there are close to ninety thousand cubic feet or something like that, and it would cost between \$28,000.00—\$30,000.00." (710)

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ROBERT PERKINS, produced by the defendant, testified: (721) "I live in Sioux Falls and am a architect. Graduated from Armour Institute of Technology of Chicago, Columbia University of New York, State University of California, at Berkeley, California. Basing my answer on Exhibit "D" the draft of the foundation which shows the walls and height of foundation and also on Exhibits "52," "53," "54," "55," blue prints, and assuming that the building with the foundation 44 x 60, constructed four miles south of Sioux Falls, on November 24, 1919, corner posts 24 feet to the foundation, outside studding to be 2 x 6 white pine or equivalent, all carrying partition studdings to be 2 x 6, sills to be box, joists to be 2 x 10 pine O. C. 16 inches on center, first floor *doubt* of white pine, finish of white pine or substitute, 5 or 6 rooms on first floor, stair-[fol. 169] way 7 feet wide circular, second floor single both floors and wood work white pine, or its substitution at that time, all windows and doors intact; third floor single flooring, five rooms, fifty-three windows in building, gambrel roof, and basing my answer further upon my experience as an architect would say that on the 24th day of November, 1919, it would cost \$30,000.00 in my best judgment to replace the building." (723)

## Cross-examination by Mr. Waggoner:

"I don't mean the price for which the property could be sold. I have no knowledge of that, I am speaking of the cost of replacing. (724) I figured the cubic feet. Mr. McWayne, my partner, and I figured it together. This estimate, included heating but not plumbing." (725)

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JOSEPH SCHWARTZ, produced by the defendant, testified: "I live in Sioux Falls and am an architect. I had supervision of the construction of the Carpenter Hotel, Cataract Hotel, First McKennan Hospital, Coliseum, and the college, (728) and have done a lot of state work, and Dick Richard's home at Huron, and also the different places in the Black Hills, and some of the college buildings at Vermillion, and residence buildings throughout the State. I am familiar with the construction of the building at South Sioux Falls [fol. 170] referred to in this case, and I got out the plans for that building, the value of the building on the 24th of November, 1919, was between \$27,000.00 and \$28,000.00, exclusive of heating." (729)

## Cross-examination by Mr. Waggoner:

"Exhibits "52," "53," "54," "55," are drawn to scale by myself." (733)

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H. R. DENNIS, produced by the defendant, testified: "I live at Sioux Falls and am in the banking business and fire insurance. (734) I know George W. Egan. Egan bought the land that is referred to at South Sioux Falls from my brother. (735) This farm I speak about is the one where the barn burned. A few days before it burned Mr. Egan and I visited the barn. On the first floor there was a lot of cobs piled in there and some oats, hay and straw, the size of the building was 60x100 or 120. (736) Egan asked me if I would write \$5,000.00 more insurance on the barn, (737) and I told him I would get it, the barn burned up before I finally got the insurance. I knew how much insurance was on the barn before I offered to get more. The insurance on the barn was made payable to my brother and to George W. Egan, as their interest might appear. Egan was to have possession of the farm on March 1, 1920. The barn burned up in September, 1919. (738) After the Al Fresco [fol. 171] Park property burned, Egan consulted me about making a proof of loss. (739) I told Egan he should get written forms to make his proof of loss on. Egan got some blank proofs and before he made any proof of loss consulted me about them, and I explained what he should put in them. Blanks similar to the last two pages of Exhibit "46" (formal proof of loss of the Firemen's Insurance Company, of Newark, New Jersey) 1441 were presented to me by Mr. Egan. I can't identify this paper Exhibit "46," but I can identify the blanks, it was a proof of loss blank like those. (740) Before anything had been filled out Mr. Egan went over

it with me as an insurance man, about what he should put in the different blanks, I told Mr. Egan to put it under the blank where it said "Total Loss", what the architects told him it would cost to replace it. (742) I advised Mr. Egan that it was a total loss. After this Mr. Egan returned with the proof of loss and asked me to examine it, and I told him at that time it was alright. (743) I saw at least one of those proofs of loss after it was filled out, and before Mr. Egan signed it. The drive out past Mr. Nash's house was a very popular drive. (744) I have seen cars pull up there and stop out there any time of the day or night, a great many of [fol. 172] them. I have often seen them drive up there and stop and turn out their lights on the automobile." (745)

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S. A. NASH, re-called by Mr. Egan, testified: "It was a frequent thing for automobiles to stop down near my house, near the Al Fresco Park, in the fall of 1919, about eight or nine in the evening, (750) and quite frequently they turned out the lights. And I have seen automobiles stop there in the orchard north of the house there by the willows by the road. (750) There were lots of farm teams driving back and forth with straw and hay. It is quite a hay country south. They went by my place at all times. (751) In the afternoon of the day before the building burned, I say Mr. Egan (752 in a taxi cab, he called to me, I was working in the yard when he came along, he asked me if I knew where Henderson was. He was in a taxi cab with some other party. It was not Mr. Egan's car. In about a half an hour he came back toward town with Mr. Henderson."

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WILLIAM PEARSON, produced by the defendant, testified: "In the late fall of 1919 I was working for Egan. (760) I am in the cement business and have had experience with carpenter work. I unloaded the cement and lumber shipped in, to the Al Fresco building, and I put the kegs of nails and the ropes in the building. (761) [fol. 173] On the day before the building burned I was working on it. Mr. Egan asked me early Sunday morning if I would go to Buffalo County, he asked me about who he could get to go for him, (763) and I suggested Henderson. Mr. Egan told me to get a taxi at two o'clock, which I did, (764) and Mr. Egan left in a taxi, and later returned, and Mr. Henderson came up to Egan's office."

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Cross-examination by Mr. Waggoner:

"It was a taxi that Mr. Egan went out in, the one which I ordered for him, and the man driving it was not W. D. Scott." (771)

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JOHN SEUBERT, produced by the defendant, testified: "I live in Sioux Falls, (772) and I was present at the Cataract Hotel at the conversation of Egan and Henderson, about Henderson storing his

stuff at the Al Fresco building. Henderson asked Egan if he could store his goods in the building, and Egan told him he could see Mr. Nash and get permission of him, and Egan said he would not be responsible in case it was stolen or burned. (773) I have driven a good many times up over the road that runs southwest by Mr. Nash's home in the past twenty years, and it is not an unusual thing to see teams driving north and south on that road. There [fol. 174] was also a lot of hauling of straw around there, and it has been a habit for people driving out there to stop under the trees in the evening, and I have seen them turn out their lights." (774)

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Mrs. GEORGE W. EGAN, produced by the defendant, testified: "I am the wife of the defendant. (776) At the time the Al Fresco burned Mr. Egan was in Sioux City. One of the neighbors at South Sioux Falls called up the house and told me that the building was burning, and I asked him to call the Fire Department, and he said they were already there, and I put in a long distance call next morning for Mr. Egan, and he came home on the first train. Mr. Egan has never driven our car, and it was not in running condition at the time of the fire. It could not be started." (777)

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THOMAS G. HENDERSON, produced by the defendant, testified: "I live at Sioux City and am a lawyer. (2224) I talked with Egan about the 20th or 23rd of November, 1919, over the telephone, and told him to arrive in Sioux City on the 24th of November, because he had a case there which was on the calendar. Mr Egan reported to my office on Monday, the 24th." (781)

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DELOSS KLOPF, produced by the defendant, testified: "I am in the Taxi business in Sioux Falls. On the Sunday before Egan's property burned at South Sioux Falls, I sent a taxi out with Mr. [fol. 175] Egan that Sunday afternoon, which was driven by Howard Butler." (782)

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HOWARD BUTLER, produced by the defendant, testified: "I live in Sioux Falls and drive a Taxi. I remember when the Al Fresco burned, and on the day before the fire I drove Mr. Egan out there. (798) I got out and looked for the man living in the house and found him. (799) The man took his suit case and came back to town with us." (800)

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JOHN BRAMER, produced by the defendant, testified: "I am a carpenter and worked with Mr. Hirschet down at the Al Fresco building. The rafters were toenailed to the main building. There were no holes cut in the side, or any siding taken off." (802)

H. M. HESSENIUS, produced by the defendant, testified: "I live in Sioux Falls and own property adjoining Mr. Egan's South Sioux Falls place. Automobiles stopping on the road out there is a common thing in the evening, and they turn their lights out, (803) they stop over by the trees and northwest of my property."

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J. M. ZELLER, produced by the defendant, testified: "I live in Sioux Falls. I remember the fire in one of Mr. Egan's buildings on North Philips Avenue. I investigated and know the cause of [fol. 176] the fire. Mr. Thomas Ross inspected the fire for us. (806) He, Egan, did not have anything to do with it. Mr. Ross fixed it up and left the property in as good a condition as it was."

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PHILLIP HULL, produced by the defendant, testified: (807) "I live in Sioux Falls. I know George Henderson. I moved his household goods down to South Sioux Falls. (808) I lived in this Al Fresco building in 1914." (809)

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NICK STOFFELS, produced by the defendant, testified: "I live in Sioux Falls. I helped put up the dance pavilion on this Al Fresco building, it was toenailed to the building, the 2x4 and 2x8 spiked into the building. I know George Henderson, I had a conversation with Mr. Henderson in the lobby of the Chicago Hotel in the presence of Goldhagen in Sioux Falls, before the arrest of Egan, (831) in which he said in substance that the Fire Marshall had told him that he had spent a thousand dollars running him down and that they were running George Egan down, and that they were going to have a trial and that there would be a lot of suspicious things brought out, but that he, Henderson, would protect himself, that he might be arrested, that he did not care about Egan, that he was going to protect himself, and that it might be a question as to who could swear the hardest." (832)

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[fol. 177] J. I. GOLDBHAGEN, produced by the defendant, testified: "I live in Sioux Falls and am in the real estate business. I know Mr. Henderson and Mr. Stoffels, and had a conversation with Henderson in the lobby of the Chicago Hotel in the presence of Stoffels, before the hearing in the Egan case. (2202) That Henderson said in the presence of Stoffels and me that the Fire Marshall was after him, and that he had spent a thousand dollars running him down, and that he was running Egan down, that he — going to save himself, that the Fire Marshal intended to arrest him; that the insurance agency had refused to pay his insurance; that he did not care about Egan, that he was going to protect himself as it might come to the question as to who could swear the har-est." (2203)

CHARLES MCGOVERN, (2234) produced by the defendant, testified: "I live in Sioux Falls and am a plumber. Done a great many jobs of plumbing in town including the Coliseum. I know Egan and had a talk with him about examining the radiators and heating plant in the Al Fresco Park building. (2235) He told me to go down and take out the radiators and fix them up and if they were not good enough to put back in the building to fix them up and see if they could be used in the garage. We found they had been frozen [fol. 178] and certain connections broken. (2236) There were three or four makes of radiators there and they were no good. They were old and we could not get the parts to fix them. Mr. Egan told us to fix them for the garage, and to get some new radiators for the building. (2237) He also told us to get the bath tub, and if it was not fit to put in there, to get a new one." (2238)

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CHARLES MCGOVERN, JR., produced by the defendant, testified: "I live in Sioux Falls, am thirty years old, and am in the plumbing business. (843) Egan had me out inspecting the radiators in the Al Fresco building. There were three or four different brands and they were old, and some of them had frozen up. This must have been about a month before the building burned. (844) I also inspected the piping and boilers. The boilers were in good condition, needed a few trimmings and a grate on one boiler. The damage to the boilers would not be over Fifteen Dollars. The piping was good. (845) The radiators that we took out weren't of much value. (846) We wrote for prices on new radiators. (847) We could not get sections to replace the broken parts of the old radiators, because the patterns were too old." (851)

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[fol. 179] JOSEPH W. JONES, produced by the defendant, testified: "I know Egan. (2248). I was Judge of the Circuit Court here for twenty-five years. I was acting as Egan's attorney in a civil suit about the 22nd of November, 1919, and Egan came to my office with a telegram. And I obtained a stay in the civil proceedings for him." (2250)

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J. J. LALLEY, produced by the defendant, testified: "I live in Sioux Falls and am in the insurance business, and know Mr. Egan, and wrote some insurance for him in the late summer of 1919. The first policy being in the fall of 1919, October 13, in the North British Mercantile Company. (858) Before Mr. Sexton and I wrote the first policy, we had a talk with Egan about what it was to cover. He told me he had an estimate of this building made by Carlson-Snitkey, that would cost him some twenty-eight or thirty thousand dollars. (859) When he came in to get the first policy, he told me he wanted five thousand dollars, and that he did not want the dance hall insured as it was going to be removed. Mr. Sexton spoke up about the rate being less if the dance hall was re-

moved, and we wrote it for five thousand dollars. (860) I remember the second policies we wrote when Mr. Potter was present, which was the Security of New Haven policy. It was on the morning of the 28th of October, 1919. Mr. Egan came in and said to me that he was going to give me another insurance policy and I said alright. Mr. Potter was State Agent for the Security Insurance Company, and was sitting in the office and I introduced Mr. Egan to Mr. Potter, and told him I would like to have him give the insurance to Mr. Potter, and they shook hands and Mr. Potter asked me for an application blank, and I got it and gave it to Mr. Potter, and Mr. Potter asked Egan how much he wanted and he said he wanted twenty-five hundred dollars, (861) on the building, and seven hundred and fifty dollars on the contents. Mr. Potter asked Egan some questions about the size of the building, etc., and Mr. Egan told him, and said, "Now Mr. Potter, I am in a hurry and I will sign this application and Mr. Lalley knows practically all about this building down there, the description, etc. I think he can give you practically the information you want." Mr. Potter asked him some questions, but I know he didn't ask him all the questions. Mr. Egan signed the application and started out. Mr. Sexton met him at the door and he came back in. There was something said about removing the dance pavilion, and Egan said it hadn't been removed but that he was about to remove it, (862) and then Mr. Sexton and Mr. Potter talked about the rate." [fol. 181] "In Exhibit "33" (The application to the Company) (ante p. 45) in answer to question number 2, as to whether the property was occupied, was answered by Mr. Egan "both".

"Mr. Egan explained that his tenant had some furniture in the building in one room of it, and I supposed he was living there, and that he was going to store some furniture, tables, and chairs and cash register and some other stuff of his in the building, and I naturally figured that would mean occupancy by both. That is the conclusion that we all reached there. In regard to the answer to the question number 17, with regard to "How much insurance," Mr. Egan said he already had five thousand dollars with us, and that he was going to give us some more, and when we got to question 17 with regard to his having other fire insurance, Answer is yes, 'If so how much and what is insured' 'Five thousand.' That we also got from the North British and Mercantile books, (863) which is all we ever put down in regard to insurance. We look up what we have on the property and that is as far as we go. Mr. Egan did not tell us how much insurance he had on the property altogether, and we did not ask him.

[fol. 182] "The statement on this Exhibit 'Age of building, ten years' Mr. Sexton answered. (864) Mr. Potter did not complete the application at all, Mr. Sexton did. Part of it was not filled out when Egan left, but was filled out later. The answer to number 17 and to number 14 was filled out after Egan left, and also the back of the Exhibit was filled out after Egan left. (865) Mr Egan told me before the policy was written what the estimate of Carlson-Snitkey was on the building. He told us he was going to raise the

insurance on his property and he told us in the presence of Mr. Potter that he was going to put all the insurance on that property that it would stand, (866) and he told Mr. Potter the applied valuation of the property."

Cross-examination by Mr. Waggoner:

"Mr. Sexton was right there with me at the time he came up about the first policy. (868) At the time I wrote down five thousand on the application as being the insurance carried, I did not believe it was all the insurance he had on the property. (872) That question has reference to what we write and not to what anybody else writes. Potter and I put in the answer to question 14."

Redirect examination by Mr. Egan:

"Egan did not tell us that five thousand dollars was all the insurance he had on the building. He did tell us Henderson was living down there as caretaker at the time, and that he, Egan, had some of his own stuff stored there, (873) and it was suggested by either myself or Mr. Potter that that would constitute as both, occupying the building."

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ARTHUR B. FAIRBANK, produced by the defendant, testified: "I live in Sioux Falls, and am an attorney, appearing with Egan in a case brought by Egan against the Firemen's Insurance Company to recover his insurance. (875) In that trial Deloss Klopp was called as a witness and examined either by myself or Mr. Egan. We produced a book of charges and it had entries of different dates upon different pages, but not in consecutive order always, that was one of the objections made to its admissibility. (876) Klopp testified in regard to it and it was finally admitted. Referring to the particular charge against the defendant bearing date of the 23rd of November, 1919, that particular entry was on a page where there was different months charged, or else there were charges before it of a later date, and after it of a later date. I know it was out of order in its dates." (877)

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GEORGE G. McDONALD, produced by the defendant, testified: "I live in Sioux Falls and am in the insurance business. I talked [fol. 184] with Mr. Egan after his building burned, about how a proof of loss should be made out. (878) Egan asked me if I had any blanks for that purpose, and I told him I did not, that there were insurance agents who did have the proper blanks. He asked me how about the loss, and I told him whatever salvage there was should be deducted from the loss, and he said there was no salvage. I told him the loss was the replacement value of the building, and that they would either have to replace the building or pay

the money. I told him that it was my understanding that he should put in the proof of loss as its value the amount it would require to replace the building." (879)

Cross-examination by Mr. Waggoner:

"At that time insurance was my principal business."

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HAROLD WHITEHOUSE, produced by the defendant, testified: "State's Exhibit '3' is copy of insurance policy of the Firemen's Insurance Company of Newark, New Jersey. Neal Bassett is the Vice-President of that Company." (882)

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GEORGE W. EGAN, examined by himself, testified: "I am fifty years old, live in Sioux Falls, South Dakota, and have for fifteen years, and am the defendant. (883) I know George R. Henderson, and first met him in May, 1919. I met him in the Cataract [fol. 185] Hotel in late August, or early September of 1919. I came into the lobby, and as I did so, I heard some one say, 'There is Egan now.' I looked up and saw Mr. John Seubert and Mr. Henderson, and they walked over to me, and Henderson asked me if he could store some goods in this building. (884) I told him that it would be all right with me for him to store his goods there, but to go down and see Mr. Nash who was living there, and he said he would. Before we parted I said that while he was at liberty to put his goods in my building that I would not be responsible if they were stolen or if they burned up, and he said he understood that. (885) There was a dance pavilion on the south side of this property (886) when I purchased it. Henderson helped me take it down. In regard to the flooring of the dance pavilion I did not want to pile it inside, because my insurance did not cover the dance pavilion, and if there should be a fire I would lose the value of the stuff I had in the dance pavilion, (887) and he said if I left it out the weather would destroy it, so I told him to put it inside. I never had any talk with Henderson about insurance except as I stated, I told him that if the building was to burn up with part of the dance hall in it I could not get my insurance, because I had agreed to move the dance pavilion. I never knew he had insurance [fol. 186] and never talked with him about it until after the loss. (888) Mr. Henderson had his household goods in my building. I took out this policy from the Whitehouse Insurance Agency. I had the property inspected with a view of making repairs, that I was going to have the building remodelled into a summer home, that is the front part of it and the back part of it for a farm residence for the man that would tend to the farm and live there. That I wanted to get insurance enough to cover it; that I was going to remove the dance hall. Whitehouse told me that if the dance pavilion was removed, the rate would be reduced, so I told him I

would write out an agreement to remove the dance hall, and he could send it into the company, and then when the dance hall was removed we could fix the rate. I brought this letter to Whitehouse and he said we would send it to the Company. (890) Exhibit "C" is a carbon copy of this letter. (891) In regard to previous fires in my property, there was a fire in the dwelling house at Fifth and Spring in this city when the building was being remodelled. I benefited nothing by the fire. The insurance company settled with me at two hundred dollars less than it cost me to fix it the way it was before the fire, besides losing a couple of months rent. (892) [fol. 187] There was also a little fire on some property on North Phillips Avenue that caught from the chimney adjoining, the insurance company fixed it also. This barn that has been testified about, burned down in September, 1919. I did not have legal possession of it, and did not get legal possession or title of it until the following March. (893) I benefited nothing by this fire. (897) Floyd Nash was living in the building when I bought it in the summer. (899) Before Mr. Nash moved out Mr. Henderson moved in. George R. Henderson was living there at the time of the fire, and the building was occupied. I had property of my own in there and occupied the building in that way. The answer to question number 14, in Exhibit "32" or "33," which states 'Occupied by both' was not given by me, (900) but if I was there I would have given it, as it is the truth. In answer to the question in the application, 'How much insurance on the building,' was not answered while I was in the room. Before the insurance was written I sent down a plumber to inspect the heating department. I told him to leave everything that could be used there and any part that was unfit for use to bring away and repair it and put it back, and if it could not be repaired, (901) to order me some new stuff. He went out there and brought back some radiators that it was [fol. 188] impossible to get new sections for, because they were out of date. (902) My intention in removing them was to replace with new ones what could not be used. (903) On either the 22nd or 23rd of November, Henderson & Freeburg, Attorneys of Sioux City, called me to come down there, because I had a case which was coming on for trial. (904) On Sunday, 23rd of November, I received a copy of the decree in case of Charles McDonald vs. Egan, that I had to pay \$4,737.23, or they would levy on my property. I decided to send somebody out to look up this real estate, and if it was worth the price to pay it and if not, appeal the case, so I called on Mr. Pearson, (906) he could not go, but suggested that I get Henderson, so I got a taxi and drove out that afternoon to the building, but could not find Henderson there, but found him (907) in the neighborhood, and went back to town. He agreed to go. (908) I never said to Henderson that, 'We had won the game' or anything of that kind. (912) I never at any time asked him if he thought the building would burn down if it got on fire. (913) Carlson-Snitkey inspected the property in the late summer of 1919, with a view of making alterations and repairs and estimated its

value. (920) Henderson told me that he did not like to stay there on account of the cold, and I told him I wanted him to stay [fol. 189] in the building. He said the wind blew in from the northeast corner and I said the ground is frozen up and it would be quite difficult to bank it with dirt, that we might have some straw hauled over from the old straw bottom, and that he could bank it up with that. (923) This straw was rotted and black and only suited for banking purposes. (824) This automobile that Mrs. Lorenzen testified about, from the way she described it must have stopped at least one thousand feet west of my house on the main road. (925) I know nothing about this particular automobile. I do know that this spot is regarded as the popular trysting place about Sioux Falls, and cars stopped there regularly. I know nothing about the box wagons and hay racks they testified about going down that road. (926) On the 24th of November I was in Sioux City. (928) The first I knew about the fire was a long distance call from my wife. (929) After the fire I went to Carlson-Snitkey and asked them to make out a statement as to what the building was worth, and what it would cost to replace it, (933) which they did. (934) I got some formal blanks and took them to Mr. Dennis who was an insurance man, and we talked it over. I asked him what to put in where it said value of property, and he told me to put in what it would cost to replace it, because [fol. 190] the company ought to replace it, or pay me. I then went to Whitehouse's office, (935) and Whitehouse prepared the proof of loss, and this proof of the Firemen's Insurance Company of Newark, New Jersey, I took up to Mr. Dennis before I signed it and checked it over with him, and he said it was absolutely correct. I relied on his judgment. (936) And when I signed this proof of loss in Mr. Whitehouse's office I absolutely believed it to be true in every particular, and had no intention of deceiving anybody. In regard to Exhibit "2," Mr. Nugen asked me to fill in the blanks the description of the property and the name of the tenant, which I wrote in my own hand. (937) The balance of it was filled in after I left. I made no representations to Mr. Nugen of how much insurance I had on the property. In regard to Exhibit "33," I never told Mr. Lalley or Mr. Sexton anything about five thousand dollars being all the insurance I had, they never asked me about insurance. That was put in after I left, and I suppose as they testified, they got it from their books, because I had that much with them already." (938)

Cross-examination by Mr. Waggoner:

"Mr. Wallace D. Scott was not down with me on Sunday the 23rd when I went out to get Henderson to look up the Buffalo County [fol. 191] land. (930) And I was not there in a Lozier car. (941) In application, Exhibit "32," I had nothing to do with the question of the applicant's value of ten thousand dollars, and know nothing about it. I had nothing to do with the statement of concurrent insurance five thousand dollars and did not know it was there. And

in regard to Exhibit "33," I had nothing to do with the question 17 about other fire insurance and how much, and I had nothing to do with the question 14 about whether or not there was any other fires. (957) The first two pages of State's Exhibit "41," were prepared by me and signed by me under different dates. I don't know whether they were sent into the company or not. The same would be true of the other proofs of loss, it is my signature on the papers. The little slip on the back of Exhibit "41" I did not attach to the proof of loss, I did not send it. (960) The slip on the back of the Firemen's Insurance Company of Newark, New Jersey, proof of loss is my signature." (962)

Redirect examination :

"When I purchased Henderson's farm up near Colton, the tenants were making some complaint about repairs and I asked Henderson if he would go up there and stay with the boys, (968) and fix that place up satisfactory to them. I never asked him to stay all night, I never tried to send him."

[fol. 192]

State's Rebuttal

WILLIAM STEELE, produced by the State on rebuttal, testified: "I live in Sioux City, Iowa, and am an architect. (983) The cubic foot rule is merely a convenient way to arrive at an approximation of the value of a building, it is the comparison of buildings by the cubic contents with relation of their price, but is used as a short method for approximating cost of value of buildings by a quick and simple way. (985) Its accuracy depends largely on who uses it, but it is not as accurate as a competent estimate after a careful listing of quantities of material. If given the dimensions of a building, the number of rooms the height of the corner posts, the kind of material, dimensions of lumber and so on, I could figure up the cost of cubic feet." (986)

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L. C. NICHOLS, produced by the prosecution on rebuttal, testified: "I live in Sioux Falls, am State Agent for the Home Insurance Company, and know William Snitkey. (995) I had a conversation with him in the Elk's Club in Sioux Falls in the month of January, 1920, and he told me in substance and effect that he had given Egan no written statement as to the amount of the loss; that he did feel that the property could be replaced for a great deal less [fol. 193] money than Mr. Egan was claiming, and also that he had figured up the cost after the fire and that the total figures were not as much as the defendant wanted them to be. He also stated he did not consider the sound value of the building to be more than seven thousand five hundred dollars." (996)

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MRS. F. L. CRANE, produced by the prosecution on rebuttal, testified: "I live in California, but did live in Sioux Falls, in November,

1919. I know Mr. Egan. I was at the Al Fresco Park on the afternoon of November 23, 1919. (1001) I saw Egan there, and I saw Mr. Egan's car out there, it was a Lozier car. Mr. Crane and Mr. Egan were away looking after some moving business. My husband is a house mover. (1003) Howard Butler was not driving the car at that time. As near as I can tell Exhibit "68" is a picture of the man who was driving the car at that time." (1005)

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F. L. CRANE, produced by the prosecution on rebuttal, testified: "I used to live here in Sioux Falls, and was a house mover. On the 23rd of November, 1919, (1011) in the afternoon, I was out at the Al Fresco Park building. I had an appointment with George Egan out there and met him. Egan was driving a Lozier car. (1012) Howard Butler was not driving for him, but another man." (1013)

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[fol. 194] F. O. HUNTING, produced by the prosecution on rebuttal, testified: "I live at Sloan, Iowa. (1028) Was in Sioux Falls on the 23rd day of November, 1919, and went out to the Al Fresco Park property with Mr. and Mrs. Crane, (1029) and saw Egan out there. (1030) Howard Butler was not driving his car."

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ODEAN HAREID, produced by the prosecution on rebuttal, testified: (1038) "I am the Clerk of the Court. In the case of Holton Davenport Trustee in Bankruptcy against Egan, I had Exhibit "N" in that case, which was a bound book produced by Mr. Klopp, the taxi man. (1039) We took photographic copies of it, and it was returned to Mr. Klopp. Exhibits "57," "58," "60," "61," "62," "63," "64," "65," "66," and "67," are the photographs."

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GEORGE FOX, produced by the prosecution, testified: (1040) "Exhibits "57" to "67" are the photographs I made of the book brought me by Mr. Hareid."

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State offers in evidence Exhibits "57" to "67." Objected to for the reason that it is hearsay and secondary and incompetent, not the best evidence, the defendant is entitled to be confronted in the Court with the real evidence. Not tending to prove or disprove any of the issues, prejudicial, incompetent for all of those reasons. no [fol. 195] proper foundation laid, it isn't shown that the defendant had anything to do with making them. Objection overruled. Exception allowed. Exhibits received.

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G. C. CHRISTOPHERSON, produced by the prosecution, testified: "I live in Sioux Falls, (1046) am teaching in the Sioux Falls Business College, penmanship and bookkeeping. Have some knowl-

edge of handwriting, have been called as a witness in various cases. I examined the books of the Klopp Taxi Company of which Exhibit "59" appears to be a photograph. (1047) I examined Exhibits "57" to "67." The figure "23" of what purports to be a photographic copy of page 39 of the original book appeared to be changed. The ink appeared to be different than the rest of the page, and the figure- on the "23" were heavier than the rest." (1049)

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L. C. MEYER, produced by the prosecution on rebuttal, testified: "I live in Sioux Falls and am a contractor and builder. (1057) I know the Al Fresco Park property. Made an inspection of it after the building burned. I found the foundation to be 40 x 60, (1058) and it was still there. I have examined the plans, Exhibits "52," "53," "54," "55," (1060) and it would take 23,892 feet of dimension lumber to reproduce that, and 24,000 shingles, and [fol. 196] forty thousand lath, and one thousand and forty dollars to plaster it, and eleven hundred dollars to paint it. (1062) It would cost about six thousand dollars for the mill work and lumber necessary to rebuild it, and about one hundred and ninety-eight dollars for the chimneys, about three hundred eighty-two dollars for hardware and nails, about thirty-six hundred dollars for carpenter labor and three hundred and twenty dollars for sheet metal work, and I figured about eight hundred dollars profit to the man who built it. (1063) The total cost of the items I have mentioned would be \$13,732.00 and that is all that would be necessary, exclusive of the heating and plumbing, wiring and foundation." (1069)

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A. D. FELLOWS, produced by the prosecution on rebuttal, testified: "I live in Sioux Falls and am a carpenter. I knew the Al Fresco building and have worked on it. (1067) I figured out how much I thought it would cost to build the building on plans, Exhibits "52," "53," "54," "55," "56," (1068) and my figures show \$12,500.00 including the foundation." (1069)

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PETER LYNUM, produced by the prosecution on rebuttal, testified: "I live in Sioux Falls, (1075) and am a builder. I have seen Exhibit "52," (1076) and have figured up what I thought it would [fol. 197] cost to rebuild this building on November 24, 1919. (1077) I figured it would take \$13,693.60 as the total cost of material without profit to construct the building, (1079) and I put in \$1,369.00 as profit, making a total cost in my opinion of \$15,062.60. (1080)

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GEORGE W. EGAN, being called on rebuttal, on behalf of defendant, testified: "That Exhibit "P" is a photograph of W. D. Scott, an attorney that used to be in Sioux Falls. (1083) Mr. Scott did not

drive me down to South Sioux Falls on the 22nd or 23rd or 24th of November, 1919. (1084) In regard to Mr. Crane I had an appointment with him to meet me out there in October, I cannot give the exact date. (1084) I never talked with him on the 23rd of November, it was before that." (1085)

Defendant at this time renews his motion made at the close of the State's case, for an advised verdict on all the grounds stated therein, and asks permission of the Court that an order may be entered.

By the Court: The same motion may be had at the close of the evidence and the same ruling. (1086) (Ante pp. 104 and 105.)

Both sides rests.

### Statement as to Evidence

The above constitutes all the evidence introduced at the trial of this action.

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### [fol. 198] DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED

The defendant at the proper time asked the Court to give the following instructions which were by the Court refused, and to which refusal defendant at the proper time took exception:

### Number 3

"It appears from the evidence in this case that the policy issued to the defendant by the Firemen's Insurance Company of Newark, New Jersey, was for twenty-five hundred dollars, and that at the time of the fire there were other policies of fire insurance upon the same building, and that all the policies aggregated twenty-seven thousand five hundred dollars. You are instructed that under the Insurance Statute of South Dakota, if the insured building was totally destroyed by fire without criminal fault on the part of the defendant the total of the insurance outstanding on the property must be taken conclusively, to be the value of the property, and the liability of the Firemen's Insurance Company must be conclusively deemed to be twenty-five hundred dollars, the amount of the policy, and that consequently any matters stated in the claim against the insurance company by the defendant regarding the value of the building, would be wholly immaterial and would cause no prejudice or injury to the insurance company.

[fol. 199] "You are further instructed that within the meaning of the statute the building was wholly destroyed by fire. You are therefore instructed that unless you believe from the evidence beyond a reasonable doubt that the defendant burned the building, or caused, or procured some one else to do it, the making of any statement in the claim or proof of loss by the defendant respecting the

value of the building would be immaterial, and would not constitute the presentation of a false or fraudulent claim upon a contract of insurance."

Refused. James McNenny, Judge. (1148)

#### Number 4

"The jury are instructed that there has not been presented upon the trial of this case, sufficient evidence to prove beyond a reasonable doubt that the defendant burned the building, or caused, or procured some other person to burn the building, and that the State has failed to prove beyond a reasonable doubt that the defendant presented a false or fraudulent claim upon a contract of insurance for the payment of a loss, thereunder, by reason of the facts that he stated in his claim or proof of loss that the cause of the fire was unknown to him."

Refused. James McNenny, Judge. (1149)

The Court announced that it would give the following

[fol. 200]

#### INSTRUCTIONS GIVEN TO JURY

##### Number 1

"Gentlemen of the jury, in this case the defendant, George W. Egan, stands before you charged by an information filed by the State's Attorney of Minnehaha County on the 10th day of May, 1920, with the crime known to the law as presenting a false and fraudulent claim and proof of loss upon a contract of fire insurance." (1133)

##### Number 2

"The information has been read to you at the beginning of the trial. It is quite lengthy, but in substance it charges that the defendant, George W. Egan, did on or about January 9, 1920, in Minnehaha County, knowingly present to the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof of loss upon a contract of insurance issued by the said company for the payment of any loss that might occur by fire to the two and a half story frame building situated on tracks four and five, County Auditor's Subdivision of the Northwest  $\frac{1}{4}$  of Section 32, Township 101, Range 49, Minnehaha County, South Dakota." (1133)

##### Number 8

"The defendant is substantially charged with three false and [fol. 201] fraudulent representations in a claim and proof of loss on said building, which it is contended by the State was prepared by the defendant and presented to the Firemen's Insurance Company, and it will be necessary for me to submit it to you under three separate divisions, and you should consider each one separately." (1135)

## Number 9

"The first particular in which it is contended by the State that the proof of loss was false, is, that the defendant in said claim and proof of loss, falsely, fraudulently and knowingly represented and stated that the cause of the fire was unknown. And it is contended by the State that the cause of the fire was well known to the defendant." (1135)

"The second particular in which it is contended that the proof of loss was false, is, that it is contended that the defendant in said claim and proof of loss fraudulently, falsely, and knowingly, represented and stated that the value of the building was thirty thousand dollars, and the contention of the State is that in truth and in fact said building was worth materially and substantially less than thirty thousand dollars." (1135)

## Number 11

"The third particular in which it is contended that the claim was [fol. 202] false, is, that the State contends that in said proof of loss the defendant did, falsely, fraudulent-, and knowingly represented and stated that the first floor of the said building was at the time of the fire occupied as a dwelling, and the contention of the State is that it was not at that time occupied as a dwelling." (1135)

## Number 13

"Under this statute it is not necessary that the insurance company be deceived or defrauded or injured in any way. The law simply makes it a crime to present or cause to be presented to the insurance company, a false or fraudulent claim or proof of loss, and that is the crime the defendant is accused of, and no other." (1136)

## Number 14

"The term false and fraudulent in this statute means practically the same thing. They simply mean that the presenting of a claim or proof of loss, which is knowingly untrue as to some material matter therein stated." (1136)

## Number 16

"It is an established fact that the building was wholly destroyed by fire on or about November 24, 1919. I will now call your attention to the first charge against the defendant, which I have heretofore mentioned, and the first question for you to determine in con-[fol. 203] sidering said charge will be, did the defendant in Minnehaha County on or about the 9th day of January, 1920, present or caused to be presented to the Agent of said Firemen's Insurance Company, or mail to said company a claim or proof of loss of said building. If you believe from the evidence and beyond a reasonable

doubt that he did, you will then determine whether or not in said claim or proof of loss he knowingly made any false or fraudulent claim therein, and in that connection I will call your attention to the first particular in which it is contended by the State that the claim was false and fraudulent and in relation thereto the Court instructs you that before you can consider the question of whether the defendant falsely and fraudulently represented that the cause of the fire was unknown, that you must first determine whether the defendant caused said building to be burned, or was implicated in burning it. That is, aided or abetted in causing it to be burned. By aiding and abetting is meant in advising, assisting, procuring or encouraging another to burn the building, although he himself may not be present when the fire occurred. This is purely a question of fact for the jury to determine from all the evidence in the case, applying to it your judgment and experience as men. And if the [fol. 204] evidence fails to satisfy your minds, and each of your minds, beyond a reasonable doubt, that the defendant caused, aided or abetted in causing the said building to be burned or was in some way implicated in its burning as I have explained, it to you, you would not consider this contention of the State any further." (113')

#### Number 17

"If, however, you are satisfied from the evidence and beyond a reasonable doubt that the defendant did cause or aided or abetted or was in some way knowingly implicated in causing said building to be burned, you must then find that whether in the County and at the time I have mentioned, the defendant presented or caused to be presented to the Agent of said insurance company or to the company, a proof of loss in which he knowingly represented or stated that the cause of the fire was unknown. If you find from all the evidence and beyond a reasonable doubt that he did present such claim and proof of loss containing said representations and that when he made such representations he knew the cause of the fire, you will then determine such representations or statements were materially, substantially and knowingly false, and you would find the defendant guilty." (1137)

[fol. 205]

#### Number 18

"The second proposition wherein it is contended that the proof of claim was false and fraudulent, present also the pure question of fact for you to determine from all the evidence in the case, applying to it your judgment and experience as men in determining whether the representations or statement that the value of the building was thirty thousand dollars. If you find such were made, were false, it will be necessary for you to form or arrive at some estimate of the value of the building burned, in the condition it was, in the location it was, at the time of the fire, not necessarily what a new building of the same size and dimensions and of the same kind and character would cost, but what you estimate the building to

have been worth at the time of the fire. Taking into consideration the original cost of the building, amount the defendant paid for the building, its age and general state of repair, the cost of replacing it and the purpose for which it was intended to be used, or could have been used. It is not necessary that you arrive at, find or fix any definite or exact value of the building, for the real question is not what was the exact value of the building at the time of the fire, but, was the value placed upon it by the defendant in his claim and proof of loss, materially, substantially and knowingly false." (1138)

#### Number 20

"If you believe from all of the evidence beyond a reasonable doubt that the defendant within the County and time I have mentioned, presented or caused to be presented to the Agent of the said Firemen's Insurance Company or mailed to the company, a claim and proof of loss in which he knowingly represented or stated that the building was of the value of thirty thousand dollars, and you further find from the evidence beyond a reasonable doubt such valuation was materially, substantially and knowingly false, you should find the defendant guilty as charged in the information." (1139)

#### Number 21

"Upon the third charge, or division you are instructed to first determine whether within the County and time I have mentioned the defendant presented or caused to be presented to the agent of said insurance company, or mailed to said company a claim and proof of loss in which he knowingly represented or stated that the first floor of the building was at the time of the fire occupied as a dwelling, if you believe from all of the evidence beyond a reasonable doubt that he did, you will then find whether such representations or statements were knowingly false. Now a dwelling is a [fol. 207] place where some one lives, where he makes his home for the time being to the exclusion of other places of abode, and it will be for you to find and determine from all of the evidence whether or not the first floor of the building was or was not occupied as a dwelling at the time of the fire, and if the evidence proves to you beyond a reasonable doubt within the County and time I have mentioned, the defendant presented, or caused to be presented to the agent of the said insurance company, or mailed to said company a claim and proof of loss of said building in which he knowingly represented or stated that the first floor or said building was at the time of the fire occupied as a dwelling and that such representation or statement was knowingly false, you should find him guilty as charged in the information, but if the evidence fails to prove to your satisfaction beyond a reasonable doubt any one of the facts constituting this third charge, and also fails to prove beyond a reasonable doubt any material fact constituting the first charge, and also fails

to prove beyond to reasonable doubt any material fact constituting the second charge, you should return a verdict of not guilty." (1140)

#### Number 23

"If after considering all of the evidence you and each of you are [fol. 208] satisfied beyond a reasonable doubt of the guilt of the defendant of the crime charged in the information as I have defined it to you, that is, if you are satisfied beyond a reasonable doubt that the defendant did wilfully, knowingly and fraudulently present a false claim and proof of loss to the Firemen's Insurance Company of Newark, New Jersey, then you would find the defendant guilty of the crime of presenting a false claim and proof of loss to an insurance company, as charged in the information, and your verdict in that case would be 'We, the jury in the above entitled cause, find the defendant, George W. Egan, guilty of the crime of presenting a false claim and proof of loss to an insurance company as charged in the information.'" (1141)

To the giving of those Instructions Numbers 1, 2, 8, 9, 10, 11, 13, 14, 16, 17, 18, 20, 21, 23, and to the giving of each thereof the defendant at the proper time specifically objected and excepted in words as follows:

"Give me an exception to 1, 2, 8, 9, 10, 11, 13, 14, 16, 17, 18, 20, 21, and 23." (1164)

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#### VERDICT

On the 15th day of April, 1922, the jury returned its verdict as follows: "We, the jury in the above entitled cause, find the defendant George W. Egan guilty of the crime of presenting a false [fol. 209] and fraudulent claim and proof of loss upon a contract of fire insurance as charged in the information." (1163)

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#### MOTION IN ARREST OF JUDGMENT

On the 17th day of April, 1922, the defendant moved the court in writing in arrest of judgment as follows: "Comes now the defendant in the above entitled action after the return and the receipt of the verdict of the jury of the above entitled action and move the court in arrest of judgment, and that no judgment be pronounced or entered upon the verdict of the jury for the following reasons:

1. That the Court has no jurisdiction of the offense sought to be charged in the information.

2. The information does not set forth sufficient facts to constitute a criminal offense." (1162)

And the Court made and entered the following

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

"In the above entitled action the defendant's motion in arrest of judgment coming on regularly for hearing and the Court having heard and considered such motion, and being fully advised in the premises, and good cause for this order appearing, it is ordered that [fol. 210] said defendant's motion in arrest of judgment be and the same is hereby in all things overruled.

Dated this 17th day of April, 1922.

James McNenny, Judge.

Attest: Odean Hareid, Clerk.

"To the making and entry of the above and foregoing order defendant duly excepts and said exception is hereby settled and allowed.

James McNenny, Judge." (1155)

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PETITION FOR NEW TRIAL

Thereafter and before the pronouncing of judgment the defendant duly made application to the Court in writing for an order setting aside the verdict and granting him a new trial as follows:

"Now comes the defendant, George W. Egan, defendant herein and moves the Court for an order setting aside the verdict of the jury and granting him a new trial herein for the following statutory reasons:

1. That the trial has been had in the absence of the defendant and the information is for felony.
2. That the jury has received evidence out of Court other than that resulting from a view of the premises.
3. That the jury has separated without leave of the Court and have been guilty of misconduct by which a fair and due consideration of this case has been prevented.
4. That the verdict of this jury has been decided by lot, and by [fol. 211] means other than a fair expression of opinion on the part of all of the jurors.
5. That the Court has erred in its decision upon matters of law by which the defendant's substantial rights are prejudiced, in allowing or disallowing a challenge to individual jurors and in admitting or rejecting witnesses or evidence on the trial of a juror for actual bias.
6. That the Court has misdirected the jury in matters of law, and has erred in its decisions on questions of law, arising during the course of the trial.

7. That the verdict is contrary to the law and the evidence.

8. That new evidence has been discovered material to the defendant which he could not with reasonable diligence have discovered and produced at the trial.

9. Said motion will be based upon a settled record to be hereinafter settled by the Court." (1161)

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The Court announced that he would pass sentence upon the defendant without prejudice to the right of hearing on the motion for a new trial, and the following was entered: (1091)

#### JUDGMENT

On the 17th day of April, 1922, the Court sentenced the defendant to imprisonment in the South Dakota State Penitentiary for a period of two years, and further that the costs of the proceedings be taxed against him by the Clerk. (1156)

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[fol. 212]

#### SETTLED RECORD

Thereafter and within the time provided by law the defendant did procure from the official stenographer a transcript of all of the testimony and proceedings in the case, certified to as correct, and did attach thereto specifications of error which are the same as the respective assignments of error printed herein, and hereinafter set forth, except as to the last assignment with regard to refusing the appellant a new trial, and did also attach affidavits as hereinafter set out, and did serve a copy of said specifications and affidavits and showing upon the State's Attorney or Minnehaha County. And thereafter the State having filed certain affidavits and the defendant having filed further affidavits in rebuttal, the Court did attach to such settled record a certificate to the effect that such record contained the judgment roll together with a full, true and correct transcript of the proceedings had on the trial and the evidence received and rejected, in so far as the same is necessary to a full determination of the errors specified, and that the same contained all the material evidence received upon the trial, and thereupon and thereby did make a settled record in accordance to the laws of this State, all the material parts of which are, so far as is necessary [fol. 213] to a full and complete understanding of the assignments, printed herein.

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[fol. 214]

#### AFFIDAVIT OF GEORGE EGAN

George W. Egan, being first duly and solemnly sworn, on oath deposes and says that he is the defendant in the above entitled action. That he tried his own case, and was as the law provided

present at all steps in the trial of said case, and because he was his own attorney and counsel he paid particular attention to all proceedings in all matters and things of the trial, and for that reason had occasion to know of his own personal knowledge of the matters and things that are hereinafter set out.

That while the attorney General of the State was present, and at the trial of said case that the State's Attorney, L. E. Waggoner, made both arguments, i. e., the opening address, and the closing address to the jury.

That during both addresses to the jury on the part of the State's Attorney, L. E. Waggoner, he was very bitter and venomous in his attack upon the defendant, and upon the defendant's character, and on divers and many occasions, and went outside the record in his attack upon the defendant.

That pending the closing address to the jury, the State's Attorney Waggoner, in a bitter, venomous and prejudicial attack upon the defendant used, among other like language the following expressions:

[fol. 215] "GENTLEMEN OF THE JURY: The defendant Egan is guilty, I know he is guilty, everybody in the State knows he is guilty. The only question is can he be convicted?"

That at the time that the State's Attorney stated to the jury that he knew that the defendant was guilty, and that everybody in the State knew that he was guilty, the affiant "appearing as his own attorney" took exception, and stated to the Court that the statement made by the State's Attorney to the jury was prejudicial, and incompetent, and not a fair conclusion drawn from the evidence, but a statement by the State's Attorney of his own personal opinion, and further he claimed it — be the opinion of everybody in the State who knew nothing of the record in the case, and was in effect an implied threat to the jury that everybody in the State expected the defendant to be convicted, and if the jury failed to convict the defendant, they would not be doing their duty to the State, and in the eyes of the people of the State.

Geo. W. Egan.

Subscribed and sworn to before me this 17th day of November,  
A. D. 1922. Joe H. Kirby, Notary Public, South Dakota.  
(Seal.)

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[fol. 216] Thereupon the motion for a new trial was argued and the Court entered the following

#### ORDER DENYING NEW TRIAL

"In the above entitled action the defendant before the rendering of judgment having moved the Court for a new trial upon all of the statutory grounds, and the Court having extended the time for the hearing of such motion until the record was settled, and the record

having been settled this day, and such motion having been presented to this Court,

Now therefore, upon motion of the State's Attorney, it is ordered, that said motion be and the same is hereby in all things denied, and overruled and the defendant is allowed an exception to this order."

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#### APPEAL

Thereupon and within the time provided by law the appellant in this action duly appealed from the order refusing him a new trial and from the final judgment, by serving upon the Attorney General and the State's Attorney a notice of appeal as required by law, and perfected the same, by among other things filing such notice with the Clerk of said Court, together with proof of service thereof, and [fol. 217] by depositing the regular appeal fee as required by law.

Joe H. Kirby, Attorney for Appellant. George W. Egan Pro Se.

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[fol. 218]

#### APPENDIX TO BRIEF

Insert at page 25 of this brief immediately following the description of State's Ex. No. "12," the policy of the Firemen's Insurance Company of Newark, New Jersey, the following as part of the description of that policy (1213):

(Vacancy Permit: Permission is hereby granted for the within described premises to be and remain vacant for a period not exceeding sixty days at any one time. The term vacant being construed to be an empty building devoid of personal habitation, or to be and remain unoccupied for a period not exceeding six months at any one time, the term unoccupied being construed to mean a dwelling that is entirely furnished, but with the habitant temporarily absent.)

Add the following to the Appellant's Abstract of the testimony of George R. Henderson, the State's witness (Ante p. 49, Brief part I):

By Mr. Waggoner, State's attorney:

Q. "You may state what was the reasonable market value of that property which you have described, exclusive of the nails and paint, on November 24, 1919, where it was located at the time of the fire?"

Objected to as being incompetent, immaterial and irrelevant and [fol. 219] immaterial under the issues, and the witness is incompetent, and both the witness and the testimony is incompetent in this branch of the case. Not tending to prove or disprove any of the charges in this information.

Objection will be overruled and exception allowed.

A. "One hundred and seventy-five dollars." (340-341)

Insert at the end of the Appellant's Abstract of the testimony of Lewis F. Smith on Pages 92 and 93, brief part I, the following:

By Mr. Waggoner, State's attorney:

Q. "What in your opinion was the fair and reasonable market value of the old Al Fresco Park building, exclusive of the dance hall on November 24, located where it was at that time before the fire?

The objection is the same as set forth on Ante p. 92, Brief part I.

A. "Oh, fifty-five or fifty-eight hundred. (493-494).

Insert in the Appellant's Abstract of the testimony of State's witness, S. B. Dewey, on page 100, Brief part I, the following:

By Mr. Waggoner, State's attorney:

Q. "About how long a time did you have that on the market for [fol. 220] sale? (Referring to the Al Fresco.)

Objected to as irrelevant, incompetent and immaterial, not tending to establish any value.

Overruled and exception allowed.

A. "From the time I dealt for it until I sold it to Mr. Egan. (545)

Q. "And what was the purchase price?"

Mr. Egan: That would be irrelevant, incompetent and immaterial, not tending to establish any value, the only measure of value is what a piece of property is worth to the man who wanted it.

Overruled and exception allowed.

A. "Why I think it figures up to sixty-eight hundred or seven thousand, I don't remember exactly. (545)

Q. "How much of that purchase price was paid you by cash, and how much paid by assumption of the mortgages against the property?"

Mr. Egan: That would be irrelevant, incompetent, hearsay and secondary, not tending to prove or disprove any issues in the case.

Overruled, exception allowed.

A. "I think the mortgages aggregated fifty-eight hundred dollars and there was some accrued interest and back taxes and it ran up some over six thousand dollars. (545)

Insert on page 150 of Appellant's Abstract, brief part I, the following:

The second particular in which it is contended that the proof of loss was false is that it is contended that the defendant in said claim and proof of loss falsely, fraudulently, and knowingly, represented and stated that the value of the building was thirty thousand dollars, and the contention of the State is that in truth and in fact said building was worth materially and substantially less than thirty thousand dollars. (1094)

Insert in the testimony of Elsa Cromm, the State's witness, at ante page 95, brief part I, the following:

Direct examination by Mr. Waggoner:

Q. "And was the barn there when you got back?"

Same objection. Irrelevant, incompetent and immaterial.

Overruled and exception allowed.

A. "No sir." (507-508)

Insert in the testimony of the State's witness, Elsa Cromm, on ante page 95, brief part I, the following:

Defendant moves to strike from the record all the testimony of this witness for the reason stated in the objection and reiterated here, because it is incompetent, it is irrelevant and immaterial to the issues in this case. (508)

[fols. 222 & 223] Insert in the testimony of State's witness, G. E. Stowe on ante page 97 of Appellant's brief part I, the following:

By Mr. Waggoner:

Q. "Do you know what you sold it for?"

Same objection, being incompetent, immaterial and irrelevant to the issues here joined. Overruled and exception allowed.

A. "One hundred and twenty-five." (552)

[File endorsement omitted.]

Habeas corpus. Petitioner seeks his discharge from the custody of the respondent, as Sheriff of Minnehaha County, South Dakota. He is under restraint in virtue of a mittimus in the hands of the

Sheriff. This instrument was issued out of the Circuit Court of said Minnehaha County and is based upon a judgment of conviction in said Circuit Court, which judgment, petitioner claims, is a nullity.

On this 3rd day of April, 1922, petitioner was placed on trial in said court upon an information filed by the Prosecuting Attorney of said county and based upon Section 4271 Rev. Code, 1919, of South Dakota, in part as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss \* \* \* is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding \$1,000 or both."

The pertinent allegations of said information are as follows:

[fol. 225] "Information

STATE OF SOUTH DAKOTA,  
County of Minnehaha, ss:

IN THE CIRCUIT COURT THEREOF, SECOND JUDICIAL CIRCUIT, MAY  
TERM, A. D. 1920

THE STATE OF SOUTH DAKOTA

vs.

GEORGE W. EGAN, Defendant

Information for the Crime of Presenting False Claim and Proof  
of Loss

L. E. Waggoner, State's Attorney of the County, of Minnehaha, in the Second Judicial Circuit of the State of South Dakota, upon his oath informs the Court:

That the Firemen's Insurance Company of Newark, New Jersey, was at all of the times herein mentioned, a corporation, \* \* \* engaged in the business of insuring property against accidental loss by fire \* \* \* had fully complied with the laws of the State of South Dakota \* \* \* was authorized to do a fire insurance business in the State of South Dakota, \* \* \* and \* \* \* on the 6th day of September, 1919, issued to said George W. Egan its policy of insurance \* \* \* by the terms of which a two and one-half story frame building located on Tracts Four (4) and Five (5) \* \* \* of the Northwest Quarter (N.W.¼) of Section Thirty-two (32), Township One Hundred One (101), Range Forty-nine (49), Minnehaha County, South Dakota, was insured in the amount of Twenty-five Hundred Dollars (\$2,500), for the term of one year from and after September 6, 1919, and thereafter \* \* \* on or about November 24, 1919, the said property \* \* \* was consumed and with the exception of the foundation, completely destroyed by fire; \* \* \*.

[fol. 226] And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim \* \* \* wherein and whereby the said defendant represented and claimed that said building \* \* \* had been completely destroyed by fire on the 24th day of November, 1919; that the cause of said fire was unknown; that said building was occupied as a residence and summer home; that the value of said building was \$30,000; \* \* \*.

Whereas, in truth and in fact, each and all of the said statements in said proof of claim were false and fraudulent, and known to be false and fraudulent by the said defendant at the time they were made, in this; \* \* \* the cause of the said fire was at the time known to the said George W. Egan, in that he had caused and procured said fire to be set and started for the purpose and with the intent of destroying said building; and the said George W. Egan had never occupied the said building as a home or summer residence; nor had the said building ever been occupied as a home or summer residence by anybody during the time when the said [fol. 227] policy of insurance was in force \* \* \*; and

Whereas, in truth and in fact, the said building was not of the value of Thirty Thousand Dollars (\$30,000) \* \* \* all of which said false and fraudulent claims and proof of loss were made with the intent upon the part of the said George W. Egan to present and use the same in support of the said George W. Egan's claims against the said Firemen's Insurance Company, and the said defendant did thereby and by said means, commit the crime of presenting a false claim and proof of loss upon a contract of insurance contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

At the beginning of the trial, petitioner asked permission to withdraw his plea of Not Guilty, previously entered, for the purpose of formally demurring to the information. The request was denied, whereupon the petitioner objected "to the introduction of any testimony under the information in this case because, \* \* \*

3rd. That said information does not describe a public offense, that no venue is laid and that the Court is without jurisdiction in this case under the information filed herein.

5th. That the County in which the alleged offense is alleged to have been committed is not stated in said information, and that said information is defective in failing to lay the venue in order to [fol. 228] give the court jurisdiction in the premises."

This objection was overruled and at the close of the State's evidence, petitioner again challenged the jurisdiction of the Court,

adding thereto the further ground that there was a total failure of proof as to the venue of the alleged offense. Again he lost his contention and upon conviction vigorously renewed and stoutly urged his challenge to the jurisdiction of the court in his motion in arrest of judgment and in the Supreme Court on appeal. His contention availed him nothing and having exhausted all his remedies in the State courts, he has resorted to this Court, claiming an infringement of and trespass upon his rights as a citizen, which rights are vouchsafed in Section 1, Article 14 of the Amendments to the National Constitution, wherein it is provided that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Other relevant facts will be stated in the course of the opinion.

### Memorandum Opinion

1. As a postulate of the consideration of this case, it should be noted that in habeas corpus proceeding, as here, the whole inquiry is limited to an examination of fundamental and jurisdictional questions, as the habeas corpus writ cannot be employed as a substitute for a writ of error. (Ex parte Parks, 93 U. S. 18; Harlan v. Mc[fol. 229] Gourin, 218 U. S. 442, l. c. 448; Collins v. Johnston, 237 U. S. 502, l. c. 505; Bens v. U. S. 266 Fed. 152; Murray v. U. S. 273 Fed. 522; Collins v. Morgan 243 Fed. 495; Biddle v. Luvisch, 287 Fed. 699; Ex parte Salinger, 288 Fed. 752, l. c. 754; Ex parte Joly, 290 Fed. 858).

While upon habeas corpus the inquiry only extends to the power and authority of the court to act, not the correctness of its conclusions, yet in ascertaining a jurisdictional fact and whether the judgment is wholly void, the court will pursue its inquiry through the record of the proceedings.

It was said in *Moore v. Dempsey*, 261 U. S. 86, l. c. 92:

"It does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void."

2. By section 4725 of the Revised Code 1919 of South Dakota, it is provided that an "information is sufficient if it can be understood therefrom \* \* \*:

4. That the offense charged was committed within the jurisdiction of the Court, or though without the jurisdiction of the court, is triable therein."

Obviously, the information, being considered, does not meet the test of sufficiency prescribed by this statute. It cannot be sustained upon the most favorable inferences. It charges in substance that the Firemen's Insurance Company, a corporation of Newark, New Jersey, was empowered to do business in the State of South Dakota

[fol. 230] and in pursuance of its authority, insured certain property of the petitioner, located in Minnehaha County; that the property was destroyed by fire and that thereafter petitioner presented a false claim to its agents. It is not alleged where petitioner presented the false and fraudulent claim and proofs in support thereof.

A reasonable inference would be that such claim and proofs were presented to the Company at Newark, New Jersey. This would be the more reasonable inference, absent an allegation that the agents of the Company were located in South Dakota, and moreover, even with such an allegation as to the residence of the agents, under this statute, the information should have charged that the presentation of the false and fraudulent claim and proofs in support thereof were made somewhere within the jurisdiction of the court, or an allegation as provided by the statute "though without the jurisdiction of the court, is triable therein."

Though by Section 4715 South Dakota Revised Code 1919, all technical forms of pleading in criminal actions have been abolished, yet the lawmakers plainly and unequivocally provided that an information to be sufficient must yield the inference that the offense was committed within the jurisdiction of the court. This is the equivalent of an allegation that the indictment or information must [fol. 231] affirmatively show the jurisdiction of the court.

Apart from the jurisdictional question, the place of the alleged offense should be charged with such clearness and certainty as to afford full notice of the charge and thereby enable the accused to make his defense with reasonable knowledge and to plead the judgment rendered upon the information in bar of any second charge for the same offense. It is a general principle of the law that the place must be alleged with such certainty that it may be seen that the court has jurisdiction of the offense. This is the rule reinforced by Section 4725 of South Dakota's laws.

It follows from the foregoing that the information, challenged in the State Court and here, stands condemned by statute and is insufficient. Being insufficient, it cannot sustain a judgment and all proceedings tending thereto are void.

3. It is the contention of the learned Attorney General, who appears for the respondent, that even if the information did not contain proper jurisdictional averments, yet all questions thereon were foreclosed against the petitioner by his failure to file a formal demurrer. The court cannot so hold.

It is provided by Section 4771 South Dakota Revised Code of 1919, that the defendant may demur to an information when it appears upon the face thereof, among other things, "that the court [fol. 232] is without jurisdiction of the offense charged."

By Section 4779 South Dakota Revised Code 1919, it is provided that objections, under said Section 4771, can only be taken by demurrer "except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that it does not describe a public offense may be taken at the trial under the plea of not guilty and in arrest of judgment."

From the above, it is very evident that the lawmakers had in mind the fundamental proposition that jurisdiction cannot be conferred by consent, agreement or waiver, and that therefore a challenge to the jurisdiction of the court could be made at any stage of the proceeding and in any manner.

An examination of the proceedings in this case, however, discloses that the inferences of the respondent are not justified, nor are the conclusions of the Supreme Court in this regard sustained. At the very threshold of the trial, petitioner requested permission to withdraw his plea of Not Guilty for the purpose of filing a formal demurrer. This request, having been denied him, he thereupon interposed his challenge to the jurisdiction of the court, and thereafter urged his contention with vigor and persistency at every stage of the proceeding.

It does not appear upon the record that petitioner, by his conduct at the trial, waived even his personal rights or that he was estopped from asserting them, either in the state courts or here.

[fol. 233] 4. In view of the above, it is not necessary to notice the contention made in this court that the statute under which petitioner was convicted had been repealed by what is known as the Valued Policy Law. In passing, however, and in view of the analysis of the two provisions made by counsel, it should be observed that the Valued Policy Law is conclusive only as to the amount written in the policy where the property is wholly destroyed "without criminal fault on the part of the insured."

Section 4271 is leveled against the presentation of a false or fraudulent claim or any proof in support thereof. It would appear from these provisions that the presentation of a false or fraudulent claim or proof in support thereof might lay the foundation for a successful prosecution, notwithstanding the Valued Policy Law. As an illustration, a claim might be presented for the amount specified in the policy where the insured property had not in fact been destroyed at all, or where it is not wholly destroyed by fire, or it could be made the basis of a prosecution where the property had been destroyed by the "criminal fault on the part of the insured."

5. It is finally contended by the respondent that this court should not interfere by habeas corpus but that the petitioner should pursue his remedy by writ of error to the Supreme Court of the United States. This contention would be corrected if the state court had jurisdiction of the cause and merely abused the processes of the [fol. 234] court and committed irregularities but where, as here, the state court was without jurisdiction to proceed in the premises, its judgment was void and being a nullity, it was subject at any time to collateral attack. The Federal Courts are clothed by statute with power to issue writs of habeas corpus "for the purpose of an inquiry into the cause of restraint of liberty," and "shall proceed in a summary way to determine the facts in the case by weighing the testimony and arguments and thereupon to dispose of the party as law and justice require."

It is idle to say that petitioner should be required to seek a review of the proceeding in the state court by writ of error upon a record that obviously could not sustain a judgment of conviction. Moreover, in pursuing its inquiry, the court is warranted in examining all matters that go to the authority of the court to try and sentence the accused. (*Harlan v. McGourin*, 218 U. S. 442. *Moore v. Dempsey*, *supra*.)

In *ex parte Van Moore*, 221 Fed. 968, and in *Yohyowan v. Luce*, 291 Fed. 425, the Federal Court interfered by writ of habeas corpus upon the theory that the state court was wholly without jurisdiction. It is true that those cases were cognizable only in the Federal court but the proceeding as here was based upon the lack of jurisdiction of the state court.

[fol. 235] In *Castle v. Lewis*, 254 Fed. 915, l. c. 919 and 920, Judge Sanborn, in a learned and exhaustive opinion, said, among other things:

"When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in custody in violation of the Constitution, or of a law or treaty of the United States, or (b) for an act done or omitted to be done by him in pursuance of a law of the United States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States \* \* \*."

In conclusion it should be stated that it was the right and duty of this court to make inquiry into the question of proof of venue in the trial of petitioner and this was done.

There was no evidence that the alleged offense was committed at any place within the jurisdiction of the trial court and such failure of proof could have been adjudged sufficient to oust the state court of jurisdiction, even if the information had contained proper jurisdictional averments.

In view of the premises, it is the order of the court that the petitioner be discharged from the custody of the Sheriff of Minnehaha [fol. 236] County, South Dakota, and that his bond heretofore taken, pending this proceeding, be exonerated and the sureties discharged.

Kansas City, Missouri, April 1st, 1924.

Albert L. Reeves, United States District Judge.

[File endorsement omitted.]

[fol. 237]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGEMENT—April 2, 1924

It appearing that the above named petitioner, George W. Egan, was, on the 17th day of April, A. D. 1922, sentenced at a regular term of the Circuit Court, within and for the Judicial Subdivision of the County of Minnehaha, in the Second Judicial Circuit of the State of South Dakota, to imprisonment in the State Penitentiary, situated at Sioux Falls, South Dakota, for the full term and period of two years; and

It further appearing that thereafter the above named petitioner duly appealed to the Supreme Court of the State of South Dakota, from the order denying him a new trial and from the judgment and sentence of the said Circuit Court; which said Supreme Court rendered its decision refusing to grant to the above named petitioner a new trial and affirming the judgment of said court against said petitioner; and

It further appearing that upon the filing of a certificate of disqualification duly made by the Honorable James D. Elliott, United States District Judge for the District of South Dakota, a Petition for a Writ of Habeas Corpus was duly presented to the Honorable Wilbur F. Booth, Judge of the United States District Court for the District of South Dakota by assignment; and

It further appearing that on the 1st day of December, A. D. 1923, the said Honorable Wilbur F. Booth duly issued a Writ of Habeas Corpus directing the said Respondent, Vincent L. Knewel, as Sheriff of Minnehaha County, South Dakota, to produce before the Court the body of said George W. Egan, together with the reason [fols. 238 & 239] and cause why said Sheriff restrained said George W. Egan of his liberty; and

It further appearing that an order was duly made by the Honorable Wilbur F. Booth admitting said petitioner, George W. Egan, to bail in the sum of Three Thousand Dollars, pending the hearing on said Petition, and

It further appearing that said petitioner, on the 3rd day of December, A. D. 1923, gave a bail bond duly approved by the Court, and said petitioner was, on said date, released from custody, and

It further appearing that said petition was heard before the Honorable Albert L. Reeves, duly assigned to hear same, and

It further appearing that on the 2nd day of April, A. D. 1924, there was filed in the office of the Clerk of said Court, the Opinion of the said Honorable Albert L. Reeves, wherein it was found that the said petitioner, George W. Egan, should be discharged from the custody of the Sheriff of Minnehaha County, South Dakota, and that his bond, theretofore taken, should be exonerated and the sureties discharged;

Now, pursuant to the provisions of said opinion, it is Ordered, that the above named petitioner, George W. Egan, be and he is

hereby discharged from the custody of Vincent L. Knewel, as Sheriff of Minnehaha County, South Dakota, and that the Clerk of this Court furnish said Vincent L. Knewel, with a certified copy of this order, by mail, for his authority in releasing said petitioner from custody, and

It is further Ordered, that the Bond conditioned for the appearance of said petitioner be and the same is hereby exonerated and the sureties thereto be, and they are hereby relased and discharged from all liability thereunder.

[fol. 240]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 7, 1924

Now on this 29th day of April, 1924, came the Respondent by his attorneys and says that the decision and order of the Court, filed and entered in the above cause on April 2nd, 1924, which directed and ordered that the petitioner, George W. Egan, be discharged from the custody of Vincent L. Knewel, as Sheriff of Minnehaha County, South Dakota, is erroneous and unjust to the Respondent for the following reasons and in the following particulars:

First. Said Decision and Order is erroneous because Respondent was holding Petitioner in his custody under process in Respondent's hands as such Sheriff issued out of the Circuit Court of Minnehaha County, South Dakota, based upon a Judgment of Conviction against Petitioner for a criminal offense in said Circuit Court, and said Judgment was and is a valid and subsisting Judgment of said Court.

Second. Said Decision and Order of the Court is erroneous because it is based upon a finding and decision of this Court that the Judgment of Conviction described in the preceding assignment was void and a nullity upon the ground that the said Circuit Court of Minnehaha County, South Dakota which gave such judgment of [fol. 241] conviction was without jurisdiction of said cause; whereas the fact is that said Judgment of Conviction was given in a criminal cause brought against Petitioner in the Circuit Court of said County, and that said Court had jurisdiction of Petitioner and the subject matter of said action therein. That by said cause petitioner was duly prosecuted in said Court for a violation of a law of said state, and such law is not in itself repugnant to the constitution of the United States, and said prosecution was conducted according to the settled course of judicial procedure as established by the laws of the state of South Dakota, and said proceedings included due notice to the petitioner at all stages thereof, and opportunity was offered

the petitioner at all stages of the trial for a hearing on every question raised.

Third. Said Decision and Order of the District Court is erroneous because it is based upon a decision and finding of the Court that the information filed in the criminal cause in Minnehaha County described above was insufficient to sustain a judgment and, therefore, all proceedings tending to said Judgment of Conviction were void; whereas the only defect shown in said information was that same did not affirmatively show the jurisdiction of said state court to proceed in said cause. Said defect in said information did not deprive said Court of jurisdiction in said cause for the following reasons:

(a) An information must clearly show upon its face that the Court is without jurisdiction of the subject matter in order to deprive the Court of jurisdiction to try the cause. That is not true [fol. 242] of the information under consideration; at most it fails to affirmatively show that the alleged offense was committed within the jurisdiction of the court.

(b) South Dakota has a statute (Section 4779, South Dakota Revised Code of 1919) which provides in effect that a defendant in a criminal cause shall make the objection to an information that it does not affirmatively show the jurisdiction of the court by filing a written demurrer to such information, and if objection is not taken in this manner, same shall be deemed waived; and it appears from the record in this cause that Petitioner in the said criminal cause in which he was defendant did not file a written demurrer to said information.

(c) Said information under consideration was before the Supreme Court of the State of South Dakota, which is the Court of last resort in said state, and said Court found and determined that the place of the commission of the alleged offense was not an element of the offense; that the information in question did not show upon its face that offense was committed without the jurisdiction of the Court; that it merely failed to show affirmatively that the offense was committed within the jurisdiction of the Court; that the statute above described was applicable thereto; but this Court in making its said Decision and Order in this case has construed said statute as not applicable to said information, and has given a construction of said statute at variance with the highest Court of the State.

Fourth. Said Decision and Order of the District Court is erroneous because it is based upon the finding and decision of the Court that [fol. 243] it had authority and jurisdiction to review the evidence at the trial of said criminal cause in the state court, and to make a finding that no evidence was presented that the alleged offense was committed within Minnehaha County, South Dakota, and did make such finding. Such finding and decision is erroneous because no authority resides in this Court to review the evidence and make a finding at variance with the decision and record of the state court;

and further because said finding is contrary to the record of the evidence presented, and evidence was presented at such trial in that state court to the effect that the offense charged was committed within the jurisdiction of the court.

Fifth. Said Decision and Order of the District Court is erroneous because it is based upon a finding and conclusion that the prosecution in the trial of said cause in the state court failed to present evidence that the alleged offense was committed in Minnehaha County, South Dakota, and this failure ousted the said Court of jurisdiction of said cause, and that the Judgment of Conviction therein would be held void on this account, for the reason that the jurisdiction of the Court depends upon the authority given by law to the court to try and determine an alleged offense, and not upon its correct determination.

Sixth. Said Decision and Order of the District Court is erroneous in granting relief to Petitioner by Habeas Corpus for the reason that no exceptional circumstances exist in this cause which justify [fol. 244] or require the Federal District Court to interfere by Habeas Corpus with the judgment and process of the state court.

Seventh. Said Decision and Order of the Federal District Court is erroneous because it is based upon the findings of said Court that defects and irregularities existed in the proceedings and process of a state court and such claimed defects and irregularities are not jurisdictional defects, and said decision and order of this court permits the petitioner to use the writ of Habeas Corpus as a substitute for a writ of error to review alleged errors of the state court in the exercise of its jurisdiction in a criminal cause.

Eighth. Said decision and order of the District Court is erroneous because it is based upon the finding and conclusion of the Court that petitioner was being held in custody by respondent in violation of the rights of petitioner under the 14th amendment to the Constitution of the United States, and said finding and conclusion of the Court is erroneous for all the reasons stated and set forth in the foregoing errors assigned.

Ninth. The Court erred in making its said Decision and Order discharging the Petitioner from the custody of the Respondent for all of the reasons stated and set forth in the foregoing errors assigned.

Wherefore the respondent prays that the said decision and order be reversed, and the District Court be directed to dismiss the Writ of Habeas Corpus issued by it, and be directed to remand the petitioner to the custody of the Respondent.

Byron S. Payne, Hugh Gamble, Buell F. Jones, Attorneys  
for Respondent.

[File endorsement omitted.]

[fol. 246]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## PETITION FOR APPEAL—Filed May 7, 1924

To the Honorable Albert L. Reeves, District Judge:

The above named Respondent, feeling himself aggrieved by the decision and order in the above entitled proceeding, filed and entered in this cause on the 2nd day of April, 1924, which said decision and order directed that the petitioner be discharged from the custody of respondent as Sheriff of Minnehaha County, South Dakota, does hereby appeal from said decision and order to the Supreme Court of the United States for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed, that citation issue as provided by law, and that a transcript of the record, proceedings and papers, upon which said decision and order was based, duly authenticated, may be sent to the Supreme Court of the United States under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper Order touching the security to be required of him to perfect his appeal be made.

Dated this 29th day of April, 1924.

[fol. 247] Byron S. Payne, Hugh Gamble, Buell F. Jones, Attorneys for Respondent.

[File endorsement omitted.]

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[fols. 248 &amp; 249] IN UNITED STATES DISTRICT COURT

[Title omitted]

## ORDER ALLOWING APPEAL—Filed May, 7, 1924

The attached Petition of Respondent for the allowance of an appeal in the above entitled cause, being now presented, it is now ordered that the Petition be granted, and the Appeal allowed upon Respondent giving bond, conditioned as required by law in the sum of One thousand (\$1,000/00) dollars; and it is hereby certified that there is probable cause for the allowance of such appeal.

Albert L. Reeves, United States District Judge.

Attest: Jerry Carlton, Clerk. (Seal of Court.)

[File endorsement omitted.]

[fols. 250-254] BOND ON APPEAL FOR \$1,000—Approved and filed May 12, 1924; omitted in printing

[fol. 255] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPUE FOR TRANSCRIPT OF RECORD—Filed May 17, 1924

SIRS: Please take notice that the Respondent who has appealed herein to the Supreme Court of the United States, hereby designates the following as the portions of the record in this cause to be incorporated into the transcript on his appeal:

1. Writ of Habeas Corpus dated December 1, 1923.
2. Order of same date directing issue of writ, fixing return day, and admitting petitioner to bail.
3. Petition for Writ of Habeas Corpus, omitting both the majority and minority opinions of the Supreme Court of South Dakota, which were incorporated therein, and omitting petition for rehearing which was incorporated therein.
4. Amended Petition for Writ of Habeas Corpus.
5. Return to Writ of Habeas Corpus (Including Exhibit "A" attached.)
6. Opinion and Decision of the Honorable Albert L. Reeves, dated April 1, 1924, and filed April 2, 1924.
7. Order of Court, dated April 2, 1924.
8. Petition for Appeal.
9. Assignment of Errors.
- [fol. 256] 10. Order Allowing Appeal.
11. Security for Appeal.
12. Citation.
13. Statement of Proceedings had, and evidence received, at the hearing as given below, or as indicated to be incorporated by the Clerk into the transcript on this appeal:

#### Statement of Proceedings and Evidence

The hearing on the writ was had on January 3, 1924, at the hour of ten o'clock in the forenoon, at the Court Room of the Court in the Federal Building in the City of Sioux Falls, South Dakota, before the Honorable Albert L. Reeves, Judge by assignment of the District Court of South Dakota, William G. Rice and Robert Healy appearing for petitioner, and Buell F. Jones, Attorney General of the State of South Dakota and Byron S. Payne appearing for the respondent.

It was admitted and conceded in open court by the parties that the petitioner, at all times referred to in this cause, was a resident of Sioux Falls, South Dakota, and that at all of said times he was a citizen of the State of South Dakota, and a citizen of the United States of America.

## A

## Evidence Offered by Petitioner

Counsel for petitioner made the following offer of testimony: "For the purpose of showing that the Court was without jurisdiction on the face of the information, and that the Court was without jurisdiction for the reason that there was no proof in the record that the alleged false proof of loss was ever presented to the Insurance Company, and for the purpose of showing that the loss was total under [fol. 257] the statute, we offer in evidence for your Honor's consideration the following: The official record in the Supreme Court of this State, being record number 5310, Part I, or abstract of the record in the Supreme Court in the case of South Dakota, Plaintiff and respondent against George W. Egan, Defendant and appellant, together with the filing mark of the Clerk of the Supreme Court of the State of South Dakota, under date of March 3, 1923, for the purpose of showing the negative fact that jurisdiction was neither alleged in the information, nor proved at the trial. We offer this for convenience of counsel and the Court, because a record of three thousand pages is not convenient." Document offered marked Exhibit "1".

Counsel for respondent made the following objection: "We object to the same as incompetent, it appearing that it is simply the abstract of the record as prepared by the petitioner as appellant in the criminal case referred to in this proceeding. We object particularly to the same being received as evidence of the record in this case of the evidence presented before the trial Court, on the ground that it is incompetent for a court in a habeas corpus proceeding to review evidence, either for the purpose of ascertaining what the evidence showed, or whether there was evidence to support any of the issues in such case, that being a matter for the determination of the trial court in the case."

The Court received the exhibit in evidence subject to the objection.

[fol. 258]

## Exhibit I

Said Exhibit "1" is the printed abstract of the record prepared and filed by counsel for petitioner upon his appeal to the Supreme Court of the State of South Dakota from the judgment of conviction in the criminal cause described and referred to in his petition for writ of habeas corpus. (Respondent and appellant herein designates the following portions of said Exhibit I to be incorporated into the transcript on his appeal, to-wit: Pages 1 to 160, inclusive, but omitting the following therefrom:

a. Omit the information commencing in line 5 of page 2 of said Exhibit I and extending to the fifth line of folio 21 on page 8 of said Exhibit. Substitute, in place of the above portion omitted, this statement: "Said information is the same as is set out in the petition for the writ of habeas corpus, but was verified as follows:" Then

should follow the verification of the information found on pages 8 and 9 of said Exhibit I.

b. Omit the last two lines of folio 23 and the list of names found on pages 9 and 10 of said Exhibit I.)

## B

### Evidence Offered by Respondent

Respondent offered in evidence Exhibit "A" which was the brief and argument of the petitioner in the second appeal of his case to the Supreme Court of the State of South Dakota. Received without objection. This is omitted from the transcript of the record as not being material to the issues upon this appeal.

[fol. 259] Respondent offered in evidence Exhibit "B", which was the brief of counsel for the state in the criminal case of the petitioner in his second appeal to the Supreme Court of the State of South Dakota. This contains a statement of some additions and corrections to the abstract of the record set forth in Exhibit "I" offered in evidence by petitioner. Received over the objection of petitioner that it was incompetent, irrelevant and immaterial to the issues in the habeas corpus case. The following from Exhibit "B" is incorporated in the transcript of the record on this appeal:

"On page 139 of part I of Appellant's brief at the close of the direct examination of the Defendant George W. Egan, add the following as a part of his testimony: Exhibit "E" was received by mail and is offered by the Defendant and received in evidence.

### EXHIBIT "E"

Minneapolis, Minn., Dec. 30, 1919.

Registered.

Mr. George W. Egan, Sioux Falls, S. Dak.

DEAR SIR: Referring to certain papers purporting to be proofs of loss by fire alleged to have occurred on November 24th last, and involving the property mentioned in Policy No. D 12, of this Company's issue, we beg to notify you that they have failed to conform in any sense whatever to the terms and conditions of the policy aforesaid, or to the insurance laws of the State of South Dakota, re-[fol. 260] specting the furnishing of Proofs of Loss, and therefore cannot be accepted by this Company as proper proofs of loss claimed. The specific grounds for objection to the papers aforesaid, are as follows:

That they fail to contain a statement of the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured, and all others in the property; the cash value thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not covering any of said property; and the

papers also fail to include the descriptions and schedules in all policies; and no statement is contained therein respecting the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; nor is there any form or statement showing by whom or for what purpose the building and the several parts thereof were occupied at the time of the fire.

All of the foregoing requirements in connection with Proofs of Loss, following a fire, are embodied in lines numbered 83 to 98 of the policy above mentioned, and are hereby particularly referred to for your guidance.

Respectfully, Firemen's Insurance Company of Newark, N. J.,  
by Jno. B. Lee, Adjuster. JBL: S.

Exhibit N is the letter referred to in Exhibit E. I mailed a copy of Exhibit N to the several companies including the Firemen's of [fol. 261] Newark, N. J. Exhibit N is offered and received in evidence. Exhibit N is a letter or communication addressed to George W. Egan, Sioux Falls, S. D., dated November 29th, 1919, signed Carlson-Snitkey Construction Company, By W. A. Snitkey wherein the latter offers to rebuild the Alfresco Park Building for \$28,700.00 (\$27,800.00).

Respondent offered in evidence Exhibit "C". To this offer, petitioner made the following objection:

"Petitioner objects for the reason that it is incompetent, irrelevant and immaterial to any of the issues now upon inquiry on the petitioner's petition for writ of habeas corpus and the respondent's reply thereto, for the reason that the decision of the Supreme Court of the State, which became the final adjudication of the courts of this state, on petitioner's second appeal, was in no manner guided or given upon consideration of the matters in the first case, the record of that case being wholly incompetent, irrelevant and immaterial to the consideration of the case tried de novo, known as the case on second appeal, and the present detention of the petitioner by the defendant sheriff can in no manner rest upon or be bottomed upon the first appeal, for the proceedings in that case were reversed and the judgment held for naught, and the entire right and only right of the defendant sheriff in this case must be based on the judgment of the Circuit Court in the second trial, as confirmed by the Supreme Court of the State of South Dakota, and the commitment or mittimus issued thereon at the first trial having been held for naught by the decision of the Supreme Court of the state."

[fol. 262] Received by the Court subject to objection. This is a printed abstract of the proceedings and evidence submitted at the first trial of the criminal case. This was prepared by counsel for petitioner and filed by him upon the appeal to the Supreme Court of the State of South Dakota from the first judgment of conviction. This Exhibit shows that at the commencement of the first trial of petitioner in such criminal case just before the prosecution started to introduce evidence, petitioner made the following objection:

"At this time, before any testimony is received, the defendant objects and excepts to the offer or the reception of any testimony in this case under the information filed herein for the reason and because of and on the grounds that the said information does not state sufficient facts to constitute an offense under the laws of this state; and the information is defective and does not comply and conform to statutes and laws of the State of South Dakota, and is wholly and altogether insufficient and incomplete. Objection overruled and exception allowed. (S. R. 46.)"

This Exhibit also shows that counsel for petitioner in this abstract and brief made the following statement in discussing the form of the information and the question of venue, to-wit:

"As everyone who has ever had any experience with criminal procedure knows, it is one of the oldest tricks of attorneys for defendants in criminal cases to endeavor to catch the prosecuting attorney napping and thereby failing to prove the venue of the offense. It is a matter with which every tyro in criminal practice is thor-[fol. 263] oughly familiar."

Respondent also offered in evidence the testimony of H. R. Dennis, George W. Egan, Petitioner, and Harold Whitehouse from the official stenographer's transcript of the proceedings and evidence at the second trial of petitioner in said criminal case. Such stenographer's transcript was incorporated in the settled record (Bill of Exceptions) used on the motion for a new trial and appeal from the second judgment of conviction. Petitioner objected to such offers on the ground that they were incompetent, irrelevant, and immaterial to any of the issues now in hearing before the Court. Received subject to the objection. The testimony of these witnesses was summarized and abstracted in Exhibit "I" which petitioner offered in evidence, but is not complete. The testimony of Harold Whitehouse offered from such transcript or settled record contains the following:

"The signatures attached to the Proofs of Loss to the several insurance companies, Exhibits 41 to 47, inclusive, are the signatures of George W. Egan, and the signatures to the letters or papers attached to each of such Proofs of Loss, dated January 10, 1920 and January 20, 1920, respectively, are the signatures of said George W. Egan. The signature to each of such Proofs of Loss was made by said George W. Egan on January 9, 1920 in my office at 105 North Main Avenue, Sioux Falls, Minnehaha County, South Dakota, and was sworn to by him at that time before the witness as a Notary Public."

[fol. 264] Respondent also offered in evidence statements dated January 10, 1920 and January 20, 1920, respectively, attached to and forming a part of Exhibit 46 from the settled record in the case of State of South Dakota vs. George W. Egan, being criminal case referred to in the petition for the writ of habeas corpus. Petitioner objected to as follows:

"The petitioner objects to the reception in evidence of the instrument under date of January 20, offered by counsel, as irrelevant, for the following reasons:

It shows upon its face that it is an instrument subsequent to the time of the alleged delivery of the proof of loss, and in no manner refers to the proof of loss charged in the information, and there being no evidence in the record that the exhibit was ever received by, delivered to, or in any manner presented to the insurance company, the Farmers Insurance Company of Minnehaha County, or in the state of South Dakota, or elsewhere.

The petitioner objects to the letter or instrument of date of January 10, 1920, now offered by counsel for respondent, for the reason and upon the grounds following: That it in no manner refers to the proof of loss charged in the information, and there is no evidence in the record that it was ever presented to or mailed to, or received by the Farmers Insurance Company, or F. C. Whitehouse & Company, agents, to whom it purports to be addressed, in Minnehaha County, or in the state of South Dakota, or elsewhere.

By the Court: The objection will be considered with the proof."

[fol. 265] The instruments offered are as follows:

Sioux Falls, S. D., January 10, 1920.

Firemen's Insurance Company, F. C. Whitehouse and Company,  
agents, Sioux Falls, South Dakota.

GENTLEMEN: As a precautionary measure I am handing you herewith in more elaborate and specific proof of loss, estimate of cost of rebuilding and general information so far as I am able to give it, in connection with the destruction by fire of my building on which you held insurance, November 24th, 1919. The facts and figures with reference to the cost of re-building are based on my best knowledge, information and belief, and all the estimates are very conservative, under present conditions. For example I have estimated for re-building, using the same material for dimensions etc. as was in the original building; the original building was built in all dimensions stuff of white pine, sills were 6 x 12, and all partitions were built of 2 x 6's; especially strong reinforced and so substantial that after the years that it has stood upon inspection by experts, it was pronounced to be in an excellent state of affairs. The basement being already dug, it is not necessary to figure only the replacement of foundations and cross partition foundations; all of these were built of Sioux Falls granite and very substantial, but the fire destroyed the usefulness of same; the building was piped [fol. 266] for steam and contained a reservoir tank for supplying the house with water, for toilet and bath purposes; these last two items were not figures by Carlson-Snitkey Co. as I am advised by Mr. Snitkey in their estimate, placing the cost of rebuilding at \$27,800. I trust that this will furnish you all the information which you may deem desirable; I fully realize that you already have it in different forms, as I supplied to Mr. F. C. Sherman, State Agent for

the Northwestern National Insurance Co., all of these facts and they were by him, as he informed me, communicated to the other companies, holding policies on the premises. I earlier supplied you with proof in the form of the estimate of rebuilding and the amount of damage by total destruction as prepared by Carlson-Snitkey, well known building engineers of this city. I do not intend by furnishing you this additional proof to waive any of my rights, to stand upon my records, which I have heretofore made but I am desirous of having the matter closed up, and having you rebuild my buildings or pay for the same. It is immaterial to me what you do, so you get at one of them. I shall be glad to comply with your request for any other or further information.

Respectfully yours, George W. Egan.

[fol. 267]

Sioux Falls, S. D., January 20, 1920.

Firemen's Insurance Company, F. C. Whitehouse and Company, agents, Sioux Falls, South Dakota.

GENTLEMEN: Supplementing the several proofs heretofore made of my loss, I give you this information: Policy in your Company No. 959,348. Amount due under policy \$2,500.00 Property totally destroyed. Date of total destruction November 24, 1919. Value of property \$30,000.00. Cause of fire unknown. Discovered between 10 and 11 o'clock in the evening. Amount of other insurance held on building \$25,000. Size of building, cost of reconstruction according to best information of the undersigned, would be, at least, \$30,000.00. Specific statement of same having heretofore been supplied to your agents and by your agent forwarded to you. At all times I have been ready to accept from you the rebuilding of my summer home and farm residence which was destroyed and on which you carried this policy. Up to the present time you have both failed and refused to pay for the same or to rebuild it. That according to proof heretofore furnished, the undersigned owned this property and title fee save and except only mortgage of \$2,300.00 to Dennis & Dennis or Roger L. Dennis, all of which appears in your records and which you have heretofore acknowledged. Other companies insured in are:

[fol. 268] Rhode Island Ins. Co., United States Fire Ins. Co., and North River Ins. Co., Firemen's Ins. Co., of Newark, North British and Mercantile Ins. Co., Security Insurance Co., Palatine Ins. Co., United States Fire Ins. Co.

Respectfully submitted, George W. Egan.

STATE OF SOUTH DAKOTA,

County of Minnehaha, ss:

Subscribed and sworn to by George W. Egan, before me this 20th day of January, 1920.

Charles H. Bartelt, Notary Public, Minnehaha County.

Please take further notice that counsel for appellant will, on the 29th day of May, 1924, in the United States Court Rooms in the City

of Kansas City, Missouri, at ten o'clock A. M., or as soon thereafter as counsel can be heard, ask the Hon. Albert L. Reeves, United States District Judge, to settle and approve the statements of the proceedings and evidence in this cause contained in this Præcipe.

Dated May 14th, 1924.

Byron S. Payne, Buell F. Jones, Hugh Gamble, Attorneys for  
Vincent L. Knewel, as Sheriff of Minnehaha County, South  
Dakota.

To George W. Egan, petitioner and respondent in this Appeal.

[fol. 269] To the Clerk of the District Court, District of South Dakota:

Due Service of the within Præcipe and Notice by copy is admitted to have been made at Sioux Falls, S. D. on this 16th day of May 1924.

Geo. W. Egan, Attorney for ———.

[File endorsement omitted.]

---

[fol. 270] IN UNITED STATES DISTRICT COURT

[Title omitted]

ADDITIONAL PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 19, 1924

To the Honorable Jerry Carleton, clerk of the above-designated court; to Vincent L. Knewel, as sheriff of Minnehaha County, South Dakota, and to his attorneys, Byron S. Payne, Buell F. Jones, and Hugh Gamble:

Please take notice that the above named petitioner and appellee, George W. Egan, hereby designates the following portions of the record in said above entitled cause to be incorporated into the transcript on the said above named respondent's appeal to the Supreme Court of the United States:

(1) The answer and denial of the said George W. Egan filed in said Court to the return on the writ of habeas corpus which issued in said cause.

(2) The statement of the Honorable Jerry Carleton, Clerk of said Court, that the records of said Court do not show any filing in said Court of any notice of the above named respondent's election to take and file in the appellate court the printed transcript of the record printed under the supervision of the Clerk of said Court, or to file in the Supreme Court of the United States a transcript of the record under and pursuant to an act entitled "An Act to Diminish the Expense of Proceedings on Appeal, or Writ of Error, or Certiorari," ap-

[fol. 271] proved by the President of the United States on February 13, 1911.

(3) The certified transcript of all of the evidence and proceedings had and taken in the Circuit Court of Minnehaha County, South Dakota, which certified transcript of said evidence and proceedings was offered and introduced in evidence in the trial and hearing upon this habeas corpus proceeding; and that the same is absolutely necessary, material, and relevant for the proper final determination of this appeal by the Supreme Court of the United States to determine the question and issue of whether or not said Circuit Court of Minnehaha County, South Dakota, ever had or acquired jurisdiction to render a judgment of conviction against the said George W. Egan.

(4) Exhibit "I" as an entirety, the same being the printed abstract of the record in said cause which was tried in said Circuit Court of Minnehaha County, South Dakota, as aforesaid, and which was filed in the Supreme Court of South Dakota as the transcript of the record in said cause entitled "State of South Dakota vs. George W. Egan," wherein the final determination and judgment of said Supreme Court of South Dakota resulted in a judgment of conviction of this petitioner.

Dated at Sioux Falls, South Dakota, this 19th day of May, A. D. 1924.

George W. Egan, Petitioner, by His Attorneys, Wm. G. Rice,  
and Healy & Breen.

[fol. 272] UNITED STATES OF AMERICA,  
District of South Dakota, ss:

I hereby certify and return that the within Præcipe came into my hands for service on the 19th day of May 1924, and that on the same day in the City of Sioux Falls, South Dakota, I served the said Præcipe on the within-named Vincent L. Knewel, by handing to and leaving a true and correct copy thereof with him personally.

John Rooks, United States Marshal.

[File endorsement omitted.]

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[fols. 273 & 274] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 2, 1924

On reading the præcipe for record, filed by the above named respondent, it is,

Ordered, by the Court, that the same be approved with the following modifications:

Incorporate all of Exhibit One, except the information upon which the prosecution was based, the names of witnesses, as indicated in said

præcipe, and then following Pages 1 to 160 of said Exhibit One, incorporate all except affidavits touching the question of misconduct of jurors.

Albert L. Reeves, Judge.

Attest: Jerry Carleton, Clerk, by C. C. Schwarz, Deputy. (Seal of Court.)

[File endorsement omitted.]

[fols. 275 & 276] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON TRANSCRIPT OF RECORD—Filed June 2, 1924

On reading the præcipe for record, filed by the petitioner in the above case, it is,

Ordered, That paragraph one be approved and that paragraph 3 be approved with the following modification, only the testimony of witnesses, Dennis, Whitehouse and Egan of the transcript of the trial or settled record be incorporated, or such portions thereof and in such form as may be agreed upon between the parties. Such agreement or stipulation to be submitted to the Clerk.

Albert L. Reeves, Judge.

Attest: Jerry Carleton, Clerk, by C. O. Schwarz, Deputy. (Seal of Court.)

[File endorsement omitted.]

[fol. 277] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY—Filed June 23, 1924

To the clerk of the above court, to Honorable Buell R. Jones, Attorney General of the State of South Dakota, and to Honorable Byron S. Payne, associate counsel for respondent in the above-entitled cause:

You, and each of you, are hereby notified that I have carefully examined the evidence of H. R. Whitehouse, H. R. Dennis and George W. Egan, as contained in the official transcript of the evidence taken in the Circuit Court at the trial of the cause of the State of South Dakota against George W. Egan, which transcript containing the evidence of said witnesses was offered in evidence at the

trial of the above entitled cause at Sioux Falls on the 3rd and 4th days of January, A. D. 1924, and that after examining the said evidence, as contained in said transcript, I do not desire to offer any additional transcript of said evidence further than is now contained in appellant's brief and abstract, Part One in the Supreme Court of the State of South Dakota, which was offered in evidence in the trial of the above entitled cause as Petitioner's Exhibit I, for the reason I consider the abstract of the testimony, as shown by said record in the Supreme Court, sufficiently sets forth said evidence. [fol. 278] Dated this 19th day of June, A. D. 1924.

W. G. Rice, Attorney for George W. Egan, Petitioner Above  
Named and Defendant in Error on Appeal to the Supreme  
Court of the United States.

The Respondent, Vincent L. Knewell, agrees to the foregoing, except that the portion of the testimony of H. R. Whitehouse from said Official Transcript, which portion is set forth in the præcipe of Respondent, is to be included in the transcript of the record as set forth in such præcipe.

Byron S. Payne, Attorney for Vincent L. Knewell.

[File endorsement omitted.]

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[fol. 279] IN UNITED STATES DISTRICT COURT

#### CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 278 pages, numbered consecutively from 1 to 278 inclusive, is a true and complete transcript of all of the record, process, pleadings and orders, as enumerated in the written præcipes of the parties hereto, the orders of the Court and the Stipulation of the parties hereto, directing the clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said court, and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the admission of service thereof, and in addition thereto a copy of said præcipes, the orders of the Court in regard to said præcipes and the stipulation of the parties hereto, and all written opinions of the court filed in said cause.

I further certify that no notice of the respondent's election to take and file in the appellate court the printed transcript of the record, printed under the supervision of the Clerk of this court, or to file in the Supreme Court of the United States a transcript of the record under and pursuant to an act entitled "An act to Diminish the Expense of Proceedings on Appeal, or Writ of Error, or Certiorari,"

approved by the President of the United States on February 13th, 1911, has been filed in this Court.

[fol. 280] In testimony whereof I have hereunto set my hand and affixed the seal of said court in the said District, this 25th day of August, A. D. 1924.

Jerry Carleton, Clerk. (Seal U. S. Dist. Court, Dist. of South Dakota.)

Endorsed on cover: File No. 30,587. South Dakota D. C. U. S. Term No. 622. Vincent L. Knewel, as sheriff of Minnehaha County, South Dakota, appellant, vs. George W. Egan. Filed August 29th, 1924. File No. 30,587.

(5501)

POSTPONED TO ME  
JAN 26 1925

20

FILED  
JAN 14 1925  
WM. B. STANSEB  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1924.

---

**No. 622.**

---

VINCENT L. KNEWELL, AS SHERIFF OF MINNEHABA  
COUNTY, SOUTH DAKOTA, APPELLANT,

*vs.*

GEORGE W. EGAN.

---

**MOTION TO SUBSTITUTE.**

---

Come now the attorneys for the Appellant in the above case, and suggest to the Court the expiration of the term of Vincent L. Knewell as Sheriff of Minnehaha County, South Dakota, on January 6, 1925, also that George Boardman is now the duly elected, qualified and acting Sheriff of said county. They therefore pray that the said George Board-

man be substituted as the Appellant in place of the said Vincent L. Knewell. And petitioners will ever pray, etc.

Respectfully submitted,

BYRON S. PAYNE,

SAMUEL HERRICK,

*Attorneys of Record for Appellant.*

BUELL F. JONES,

*Attorney-General of South Dakota.*

MEM.—Section 2317 of the Revised Statutes of South Dakota provides as follows:

“No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. If a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law. At any time after the death or other disability of the party plaintiff, the court in which an action is pending, upon notice to such person as it may direct, and upon application of any person aggrieved may, in its discretion, order that the action be abated, unless the same be continued by the

proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order."

Reference is also had to *Thompson v. U. S.* (103 U. S., 480, 484), also to one *Corpus Juris*, 146, Section 230, and to the affidavit of Byron S. Payne, Esq., filed this day in support of motion by the State of South Dakota to intervene in this case as a party appellant.

(5278)

APR 3 1924

WM. R. STANS

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM 1924

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NO. 622

---

VINCENT L. KNEWELL, as Sheriff of Minnehaha  
County, South Dakota, Appellant,

vs.

GEORGE W. EGAN.

---

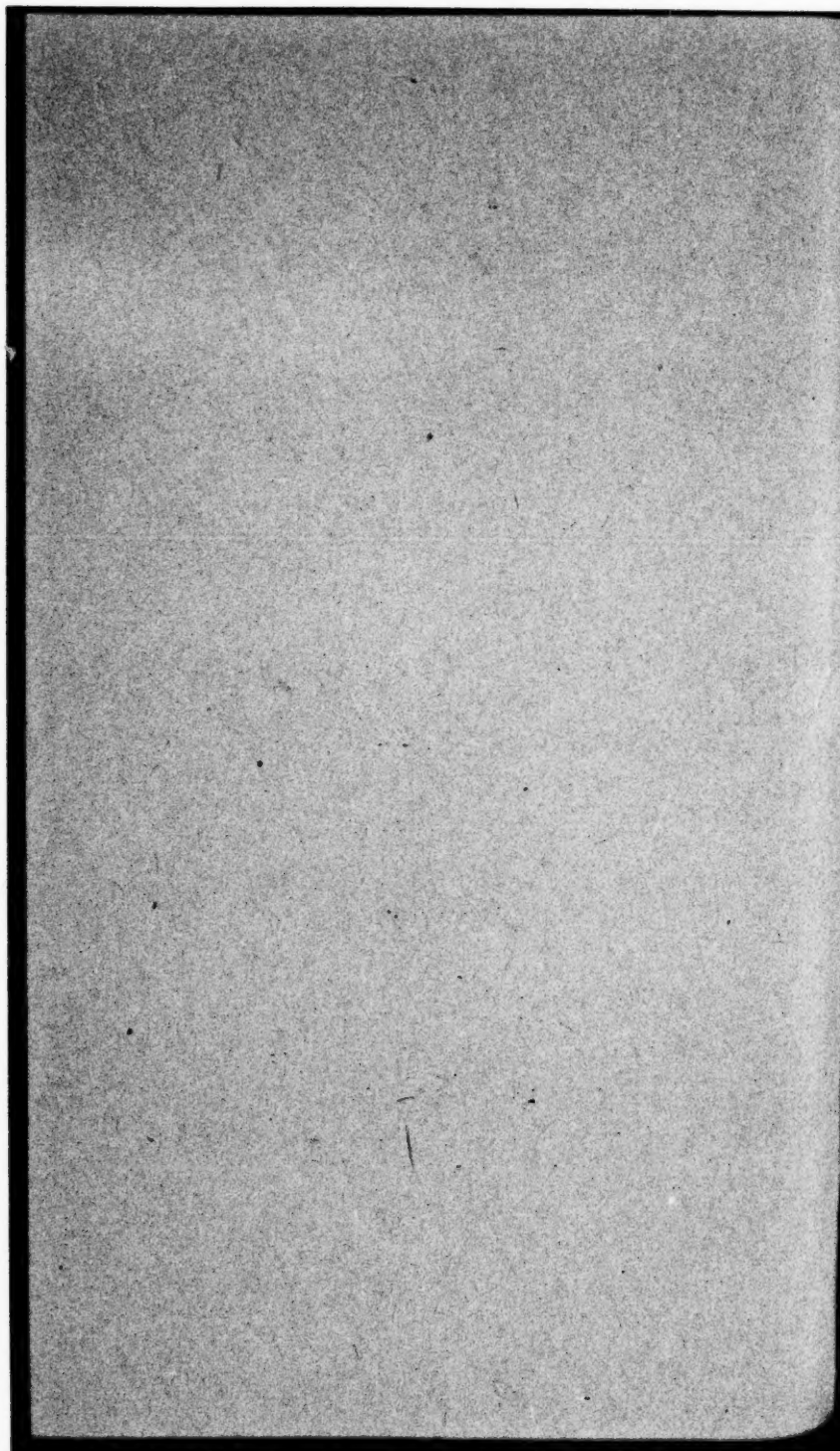
BRIEF FOR APPELLANT

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BUELL F. JONES,  
Attorney General of South Dakota.

BYRON S. PAYNE,  
J. D. COON,  
State's Attorney of Minnehaha County,  
South Dakota.

SAMUEL HERRICK,  
Counsel for Appellant.



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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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VINCENT L. KNEWELL, as Sheriff of Minnehaha  
County, South Dakota, Appellant,

vs.

GEORGE W. EGAN.

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**BRIEF FOR APPELLANT**

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**STATEMENT OF THE CASE.**

This is an appeal in a habeas corpus matter taken by Knewel, as Sheriff of Minnehaha County, South Dakota, from an Order of the United States District Court for the District of South Dakota, which Order discharged the appellee, Egan, from his custody as such officer.

Egan was charged by the State's Attorney of Minnehaha County, South Dakota, with the commission of a crime. He was tried in May, 1920, upon the charge in the Circuit Court of the State for that county, was found guilty by the jury, and was sentenced to serve a term in the state penitentiary. Egan appealed to the Supreme Court of the State, and by his appeal attacked the form of the information or charge, and assigned other errors by the trial Court. The Supreme Court vacated the judgment of the lower Court and granted a new trial. By its opinion the Supreme Court sustained the form of the information, but found errors in the record in the admission and rejection of evidence. For opinion, see 44 S. D. 273, 183 N. W. 652.

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Note—In this Brief, the pages of the printed transcript of the record are referred to by the abbreviation R with the number of the page.

Egan was again brought to trial upon the same charge in April, 1922, was again found guilty by the jury, and was again sentenced by the Court to serve a term in the state penitentiary. He appealed to the Supreme Court of the State, and upon such appeal the judgment of the trial Court was affirmed, the decision being filed October 26, 1923. For opinion, see *State vs. Egan*, (S. D.) 195 N. W. 642.

Thereupon, the process of the trial Court was placed in the hands of the appellant, Knewel, as Sheriff of said Minnehaha County, for the execution of the sentence and judgment of the Court, and for the conveyance of Egan to the state penitentiary. On December 1, 1923, while in the custody of Knewel under such process Egan secured a writ of habeas corpus directed to Knewel from the United States District Court for the District of South Dakota. The hearing upon the writ was held before the Hon. Albert L. Reeves of Kansas City, Missouri, acting as Judge of the Court by assignment in place of Hon. J. D. Elliott, the regular Judge of said Court, and on April 2nd, 1924, the Order of such Court was filed and entered, discharging Egan from the custody of Knewel. To reverse such Order, this appeal was taken.

The statute upon which the prosecution in the State Court was based is Section 4271, Revised Code 1919, South Dakota, the relevant part as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, \* \* \* is punishable by imprisonment in the state penitentiary not exceeding three years, or by a fine not exceeding \$1000, or both."

The information or charge against Egan under such statute, so far as is pertinent, is as follows: (R. 2-4)

"State of South Dakota, County of Minnehaha—ss.

"In the Circuit Court Thereof, Second Judicial Circuit, May Term, A. D. 1920.

The State of South Dakota v. George W. Egan, Defendant. Information for the Crime of presenting False Claim and Proof of Loss.

"L. E. Waggoner, state's attorney of the county of Minnehaha, in the second judicial circuit of the state of South Dakota, upon his oath informs the court:

"That the Firemen's Insurance Company of Newark, New Jersey, was at all of the times herein mentioned a corporation \* \* \* engaged in the business of insuring property against accidental loss by fire, \* \* \* had fully complied with the laws of the state of South Dakota, \* \* \* was authorized to do a fire insurance business in the state of South Dakota, \* \* \* and \* \* \* on the 6th day of September, 1919, issued to said George W. Egan its policy of insurance, \* \* \* by the terms of which a two and one-half story frame building located on tracts four (4) and five (5) \* \* \* of the northwest quarter (N. W.  $\frac{1}{4}$ ) of section thirty-two (32), township one hundred one (101), range forty-nine (49), Minnehaha county, South Dakota, was insured in the amount of twenty-five hundred dollars (\$2,500), for the term of one year from and after September 6, 1919, and thereafter, \* \* \* on or about November 24, 1919, the said property \* \* \* was consumed and with the exception of the foundation completely destroyed by fire. \* \* \*

"And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did willfully, unlawfully, and feloniously present and cause to be presented to F. C. Whitehouse & Co., who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim, a copy of which is hereto attached, marked Exhibit 'A' and made a part of this Complaint; \* \* \* wherein and whereby the said defendant represented and claimed that said building \* \* \* had been completely destroyed by fire on the 24th day of November, 1919; that the cause of said fire was unknown; that said

building was occupied as a residence and summer home; that the value of said building was \$30,000.  
\* \* \*

"Whereas, in truth and in fact, each and all of said statements in said proof of claim were false and known to be false and fraudulent by the said defendant at the time they were made, in this \* \* \* The cause of the said fire was at the time known to the said George W. Egan, in that he had caused and procured said fire to be set and started for the purpose and with the intent of destroying said building, and the said George W. Egan had never occupied the said building as a home or summer residence, nor had the said building ever been occupied as a home or summer residence by anybody during the time when the said policy of insurance was in force; \* \* \* and

"Whereas, in truth and in fact, the said building was not of the value of thirty thousand dollars (\$30,000) \* \* \* all of which said false and fraudulent claims and proof of loss were made with the intent upon the part of the said George W. Egan to present and use the same in support of the said George W. Egan's claims against the said Firemen's Insurance Company, and the said defendant did thereby and by said means commit the crime of presenting a false claim and proof of loss upon a contract of insurance, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of South Dakota."

Said Exhibit "A" (R 24-26) was a proof of loss upon a policy of insurance issued by the Firemen's Insurance Company of Newark, New Jersey, at its Sioux Falls Agency, insuring the defendant for \$2,500.00 against loss by fire upon the building located on the property above described, and the same is shown to have been verified by the defendant at Sioux Falls, in Minnehaha County, South Dakota. (R. 26)

When arraigned for the first trial, Egan did not

demur to the information, but pleaded "not guilty." (R. 17, par. III, also R. 27). When the case was called for the second trial, Egan asked permission to withdraw his plea of "not guilty" for the purpose of interposing a demurrer to the information (R. 27). The request was denied; whereupon the petitioner orally objected "to the introduction of any testimony under the information in this case, because:

(1) The information does not substantially conform to the requirements of law as prescribed in Section 4771 of the Revised Code of 1919.

(3) That said information does not describe a public offense, that no venue is laid and that the court is without jurisdiction in this case under the information filed herein.

(4) That the information does not state facts sufficient to constitute a public offense under the laws of the State.

(5) That the county in which the alleged offense is alleged to have been committed is not stated in said information, and that said information is defective in failing to lay the venue in order to give the court jurisdiction in the premises." (R. 28, 29.)

The objection was overruled by the Court. The objection was renewed by Egan at the close of the State's evidence at the trial, together with the further objection that the State had failed to prove venue, and the objections were overruled. (R. 67, 68.) The same contentions were made to the trial court by Egan after conviction by motion in arrest of judgment (R. 92) and by motion for new trial, and were denied. The Supreme Court found against the same contentions upon his appeal to that Court.

In this habeas corpus proceeding, Egan contended that the State Court was without jurisdiction of the cause for which he was tried, and his conviction therein was a nullity; that therefore his restraint under the judgment of the Court was in violation of his

rights under Section 1, Art. XIV of the Amendments to the Federal Constitution. The grounds upon which lack of jurisdiction in the State Court was urged, were: (R. 8, see also, amended petition R. 11-15.)

1. The information did not show venue; did not set forth the name of the county in which the offense was alleged to have been committed.

2. There was no proof of venue.

3. Section 4271 of the 1919 South Dakota Code, which Egan was accused of having violated, had been superseded and repealed by a later law of the State.

4. The information did not state facts sufficient to constitute a crime because it did not state that the false proof of loss was presented upon a policy of insurance.

The issues in the habeas corpus matter were made up by the petition for the writ, (R. 1-9) and amended petition, (R. 11-16), and the return of the sheriff to the writ and petition, (R. 16-22), which return was not traversed except as to some conclusions of law. The return set out the judgment of the State Court in the criminal action against Egan providing for his imprisonment. There was an answer or reply to the return. (R. 22, 23). The evidence of Egan consisted of the printed abstract of the record or statement of the case which counsel for Egan had prepared and used upon the last appeal of his case to the Supreme Court of the State, (R. 24-98). The evidence in opposition consisted of the printed brief of counsel for the state used in the same appeal to the State Court, (R. 112, 113); an excerpt from the brief of counsel for Egan used upon the first appeal of his case, (R. 113, 114); and the testimony of three witnesses and two exhibits from the official transcript of the proceedings, (Bill of Exceptions) at the last trial in the State Court, (R. 114, 116). Except the portion thus described the transcript of the evidence or Bill of Exceptions containing the evidence produced at the trial

in the State Court was not brought before the District Court in the habeas corpus matter. At the hearing, Knewel as Sheriff was represented by, and there appeared in opposition to the discharge of Egan from custody, Buell F. Jones, Attorney General of South Dakota, and Byron S. Payne. (R. 110). The appeal was taken in the name of Knewel, as Sheriff, by Buell F. Jones, Attorney General, Hugh Gamble, State's Attorney of Minnehaha County, and Byron S. Payne, special counsel representing the State, and the expense of the prosecution of the appeal has been borne by the State. See affidavit in support of Motion to Intervene, Appendix page 65.

The District Court declared in its opinion (R. 98-104) that it was its duty in habeas corpus to pursue its inquiry through the record of the proceedings and ascertain whether the requisite, jurisdictional facts existed for the State Court; citing *Moore vs. Dempsey*, 261 U. S. 86. It passed by unnoticed the fourth contention of Egan that the information was insufficient because it did not state that the false claim was presented upon a policy of insurance; stated that it was unnecessary to determine Egan's third contention, but in passing resolved this contention against him, viz: that Section 4271 had not been repealed; reviewed the South Dakota statutes and concluded that the form of the information was insufficient under the statutes to support a conviction, hence the conviction entirely void; reviewed the abstract or statement of the evidence produced before the trial court and concluded that the venue was not proved, and that this ousted the State Court of jurisdiction. Then followed the Order filed April 2nd, 1924, which discharged Egan from the custody of the Sheriff, and from which this appeal to this Court is taken. (R. 105, 106).

### ASSIGNMENTS OF ERROR (R. 106)

By the Assignments of Error which appellant has made a part of the record, appellant assigns as error

the making by the Court of said Order of April 2nd, 1924, in the following particulars and for the following reasons: (R. 106-108).

FIRST, Said Decision and Order is erroneous because Respondent was holding Petitioner in his custody under process in Respondent's hands as such Sheriff issued out of the Circuit Court of Minnehaha County, South Dakota, based upon a Judgment of Conviction against Petitioner for a criminal offense in said Circuit Court, and said Judgment was and is a valid and subsisting Judgment of said Court.

SECOND, Said Decision and Order of the Court is erroneous because it is based upon a finding and decision of this Court that the Judgment of Conviction described in the preceding assignment was void and a nullity upon the ground that the said Circuit Court of Minnehaha County, South Dakota, which gave such judgment of conviction was without jurisdiction of said cause; whereas the fact is that said Judgment of Conviction was given in a criminal cause brought against Petitioner in the Circuit Court of said County, and that said Court had jurisdiction of Petitioner and the subject matter of said action therein. That by said cause petitioner was duly prosecuted in said Court for a violation of a law of said state, and such law is not in itself repugnant to the constitution of the United States, and said prosecution was conducted according to the settled course of judicial procedure as established by the laws of the state of South Dakota, and said proceedings included due notice to the petitioner at all stages thereof and opportunity was offered the petitioner at all stages of the trial for a hearing on every question raised.

THIRD, Said Decision and Order of the District Court is erroneous because it is based upon a decision and finding of the Court that the information filed in the criminal cause in Minnehaha County described above was insufficient to sustain a judgment and, therefore, all proceedings tending to said Judgment of

Conviction were void; whereas the only defect shown in said information was that same did not affirmatively show the jurisdiction of said state court to proceed in said cause. Said defect in said information did not deprive said Court of jurisdiction in said cause for the following reasons:

(a) An information must clearly show upon its face that the Court is without jurisdiction of the subject matter in order to deprive the Court of jurisdiction to try the cause. That is not true of the information under consideration; at most it fails to affirmatively show that the alleged offense was committed within the jurisdiction of the court.

(b) South Dakota has a statute (Section 4779, South Dakota Revised Code of 1919) which provides in effect that a defendant in a criminal cause shall make the objection to an information that it does not affirmatively show the jurisdiction of the court by filing a written demurrer to such information, and if objection is not taken in this manner, same shall be deemed waived; and it appears from the record in this cause that Petitioner in the said criminal cause in which he was defendant did not file a written demurrer to said information.

(c) Said information under consideration was before the Supreme Court of the State of South Dakota, which is the Court of last resort in said state, and said Court found and determined that the place of the commission of the alleged offense was not an element of the offense; that the information in question did not show upon its face that offense was committed without the jurisdiction of the Court; that it merely failed to show affirmatively that the offense was committed within the jurisdiction of the Court; that the statute above described was applicable thereto; but this Court in making its said Decision and Order in this case has construed said statute as not applicable to said information, and has given a construction of said statute at variance with the highest Court of the State.

**FOURTH,** Said Decision and Order of the District Court is erroneous because it is based upon the finding and decision of the Court that it had authority and jurisdiction to review the evidence at the trial of said criminal cause in the state court, and to make a finding that no evidence was presented that the alleged offense was committed within Minnehaha County, South Dakota, and did make such finding. Such finding and decision is erroneous because no authority resides in this Court to review the evidence and make a finding at variance with the decision and record of the state court; and further because said finding is contrary to the record of the evidence presented, and evidence was presented at such trial in that state court to the effect that the offense charged was committed within the jurisdiction of the court.

**FIFTH,** Said Decision and Order of the District Court is erroneous because it is based upon a finding and conclusion that the prosecution in the trial of said cause in the state court failed to present evidence that the alleged offense was committed in Minnehaha County, South Dakota, and this failure ousted the said Court of jurisdiction of said cause, and that the Judgment of Conviction therein would be held void on this account, for the reason that the jurisdiction of the Court depends upon the authority given by law to the court to try and determine an alleged offense, and not upon its correct determination.

**SIXTH,** Said Decision and Order of the District Court is erroneous in granting relief to Petitioner by Habeas Corpus for the reason that no exceptional circumstances exist in this cause which justify or require the Federal District Court to interfere by Habeas Corpus with the judgment and process of the state court.

**SEVENTH,** Said Decision and Order of the Federal District Court is erroneous because it is based upon the findings of said Court that defects and irregularities existed in the proceedings and process of a

state court and such claimed defects and irregularities are not jurisdictional defects, and said decision and order of this court permits the petitioner to use the writ of Habeas Corpus as a substitute for a writ of error to review alleged errors of the state court in the exercise of its jurisdiction in a criminal cause.

EIGHTH, Said decision and order of the District Court is erroneous because it is based upon the finding and conclusion of the Court that petitioner was being held in custody by respondent in violation of the rights of petitioner under the 14th amendment to the Constitution of the United States, and said finding and conclusion of the Court is erroneous for all the reasons stated and set forth in the foregoing errors assigned.

NINTH, The Court erred in making its said Decision and Order discharging the Petitioner from the custody of the Respondent for all of the reasons stated and set forth in the foregoing errors assigned.

## STATEMENT OF POINTS

### I.

In a habeas corpus proceeding to determine the cause of restraint under a judgment of a state court, to justify release, such judgment must be shown to be absolutely void for want of jurisdiction in the court that pronounced it.

### II.

An information, such as we have here, which does not clearly show that the alleged offense was committed without the jurisdiction of the Court, but which fails to state where the alleged offense was committed and that it was committed within the jurisdiction of the Court, is not a void paper, and the act of a competent Court of general jurisdiction in passing thereon is not a void act, and a conviction based thereupon is not a nullity.

### III.

Habeas corpus cannot be used to test the suf-

iciency of such an information, nor to review a claimed erroneous ruling of the Court thereon; for to do so would be to utilize the writ for the purpose of proceedings in error. This is an ordinary habeas corpus case, and no "exceptional circumstances" exist to take it out of the general rule.

#### IV.

Egan had due process of law by his conviction under such information. The South Dakota statute provides that an information in the form here found may be used when as here the accused fails to demur thereto, and such statute forms a part of the usual and settled course of judicial procedure as established by the laws of the State, and same is not repugnant to the Federal Constitution.

#### V.

The State Court in which Egan was convicted was given power by law to try and determine the charge against Egan, and was a Court of general jurisdiction. The federal district court could not by habeas corpus review the evidence presented to the trial court, and thereby impeach collaterally the conclusion and record of the State Court with reference to the effect of such evidence.

#### VI.

Construction of the state statutes involved have been concluded by the decision of the highest Court of the State.

#### VII.

Discussion of Motion to Substitute successor of Knewell as Sheriff, and Motion of State to Intervene.

### ARGUMENTS AND AUTHORITIES

#### PROPOSITION I.

It is established by a long line of decisions of the United States Supreme Court that in a habeas corpus proceeding to determine the cause of restraint under a judgment of a State Court, to justify release, such judgment must be shown to be absolutely void for

want of jurisdiction in the Court that pronounced it. The habeas corpus inquiry reaches alone to the question of jurisdiction. *Andrews vs. Swartz, Sheriff*, 156 U. S. 272; *Bergemann vs. Backer*, 157 U. S. 655; *Ex Parte Lennon*, 166 U. S. 548; *Felts vs. Murphy*, 201 U. S. 123; *Valentina vs. Mercer*, 201 U. S. 131; *Frank vs. Mangum*, 237 U. S. 309.

#### PROPOSITION II.

Appellant contends, secondly, that the information filed against Egan in the state court was not a void paper; that the act of the state court in receiving such information and in trying Egan thereon, and the conviction of Egan based thereon, were not idle and void acts. The Court was not entirely without jurisdiction to proceed in such matter.

The attack against the form of the information made by Egan in his petition for the writ of habeas corpus is that same did not allege that Egan had committed a crime within the territory limits and jurisdiction of the Court in which it was filed, and because of this the same was void and a nullity, and the Court did not have jurisdiction to proceed (R. page 8). That was the only defect in the form of the information claimed by Egan throughout the proceedings in the state court. The return of the Sheriff to the writ, (R. 16) shows the course of the proceedings in the state court through two trials in the circuit court and through two appeals to the Supreme Court of the state, and the facts stated were not traversed. Throughout, the objection was that the information did not allege venue. For a first time in an amended petition for the writ of habeas corpus, Egan's counsel suggested that the information might be construed to charge that the crime was committed at Newark, New Jersey. (R. 14). This suggestion is based upon the descriptive words "of Newark, New Jersey" in the information wherein it is charged that the false proof of loss was presented to F. C. Whitehouse and Company, who were at that time acting as agents for the

Firemen's Insurance Company of Newark, New Jersey. The reference to Newark, New Jersey, in the information is merely *descriptio personae* as pointed out in the case of *State vs. Mahoney*, 98 Atl. 750 (Me.); see *State vs. Jackson*, 39 Me. 291. A construction so fanciful and strained that it was not thought of by Egan or his counsel throughout the long period of the litigation in the state court and at the time of his filing his petition for the writ of error, but was suggested for the first time in an amended petition, surely ought not to require much consideration from this Court in its collateral inquiry into the record. If it were not for the use of the descriptive words "of Newark, New Jersey" in connection with the name of the insurance company, the information doubtless would be held sufficient, under the theory of the Supreme Court of Wisconsin in *State vs. S. A. L.*, 46 N. W. 498. There the Court held that the words "then and there" referred to the county in the caption. There is weight to the argument of the Maine court in *State vs. Mahoney*, *supra*, that "then and there" must refer to a time and place co-existent. In the information under consideration "then" plainly refers to January 9, 1920, and the only act shown by the information to be co-existent with this time was the making and verification of the proof of loss at Sioux Falls in Minnehaha County, S. D. The defendant was informed in express terms by the information that the State's Attorney of Minnehaha County, South Dakota, was charging him with an offense against the statutes and peace and dignity of the State of South Dakota. There is enough in the information so that it might reasonably be claimed that the information informed the accused that the alleged criminal act was committed within Minnehaha County. Certainly the accused was not informed, nor did he understand, from the information, that he was charged with a criminal act performed outside of the State of South Dakota.

We think then it is clear that the most that can be claimed against the information, is that it did not

clearly set forth the place where the criminal act was performed, and fix it within the jurisdiction of the Court. The question then is, was the State Circuit Court without jurisdiction to proceed against Egan upon such information?

The Circuit Court of South Dakota is a Court of general criminal jurisdiction. See Section 14, Art. 5, S. D. Constitution and Sections 4653, 4654, 4655, and 3573, S. D. Rev. Code, 1919, (Appendix pages 59). It will be seen from the above sections of the statute that the territorial jurisdiction of the Circuit Court is not limited to a county. It extends as far as the statute law extends in its application, namely, throughout the limits of the state. The only limitation contained in the statute is found in Sec. 4654 which provides that issues of fact in any criminal case must be tried in the county in which the same is brought, or to which the place of trial is changed by order of court.

This general jurisdiction of the Circuit Court is not limited by the provisions of the State Constitution and statutes which confer personal rights on a person accused of crime. These are Secs. 6 and 7, Art. 6, South Dakota Constitution, and Sec. 4410 S. D. Code, (Appendix page 64).

Section 4813 of the South Dakota Revised Code (Appendix 64) provides for a change of the place of trial on the application of the defendant to a county other than in which the action is brought and the crime alleged to have been committed. The accused may waive the personal rights guaranteed him by the above provisions of the constitution and statute law including the right as to place of trial. State vs. Ross, (S. D.) 197 N. W. 234, and cases therein cited. The defendant consenting or waiving his right as to place of trial, the Circuit Court has jurisdiction to try and determine any case of felony, no matter in what county of the State committed.

In South Dakota a criminal action is commenced by the filing of an information. Sec. 4655 S. D. Code (Appendix page 60). By Sec. 4715 of the S. D.

Code (Appendix page 60) all technical forms of pleading in criminal actions are abolished, and it is necessary only to plead the commission of the offense by its usual designated name in plain ordinary language. Sec. 4725 (Appendix page 62) enumerates the essential statements of an information, among which is "4. That the offense charge was committed within the jurisdiction of the Court." Sec. 4771 (Appendix page 61) provides that the defendant may demur to the information when it appears upon the face thereof "1. \* \* \* that the Court is without jurisdiction of the offense charged" and "2. That it does not substantially conform to the requirements of this title," which title includes Sec. 4725 referred to above, and therefore includes the requirement that the information shall show that the offense charged was committed within the jurisdiction of the Court.

Sec. 4779 of the South Dakota Code (Appendix page 62) provides that when the objections for which demurrer may be interposed under said Sec. 4771 appear on the face of the information, they can only be taken by demurrer, except the objection that the information shows on its face that the Court has not jurisdiction over the subject of the information, and the objection that it does not describe a public offense. Other objections are waived. The objection as to the form of the information, that it does not affirmatively allege venue, as required by the Code Sec. 4725 is therefore waived. In other words, these statutes designate two distinct classes of defective informations. One class is where the information shows upon its face that the crime was committed without the jurisdiction of the Court, and therefore shows on its face that the Court did not have jurisdiction. The second class is where the information simply fails to state that the offense was committed within the jurisdiction of the Court. This latter defect goes simply to the form of the information, not to the question of the actual jurisdiction of the Court.

So far as the form of the information is concerned, and so far as the right of the Court to proceed upon the information is concerned, the accused waives the latter defect by failing to demur thereto. The assertion of jurisdiction is supplied by the bringing of the action and the title thereof.

The information under consideration was before the Supreme Court of South Dakota in the first appeal in the prosecution in the State Court, *State vs Egan* 44 S. D. 273, 183 N. W. 652, The late Justice Whiting of that Court in the opinion very clearly pointed out the distinction between the two classes of defective information, and the effect thereof, wherein he said:

"It follows, therefore, that, even though there was no demurrer interposed to the information, yet if it appears on the face of such information that the same does not state facts sufficient to constitute a criminal offense, or if it appears on the face of such information that the trial court did not have jurisdiction over the subject of the information, there was reversible error in the rulings of the Court. The sole basis of appellant's contention is the failure of the information to specifically set forth the venue of the alleged offense. No claim is made but that, if the venue had been clearly stated, the information would have stated facts sufficient to constitute a public offense. Inasmuch as the place of the alleged offense in no manner constituted an element of such offense, it is apparent that there is no merit whatsoever to the claim that the information did not state facts constituting a public offense. If the information had expressly placed the venue of the offense in some county other than that where the information was filed, it would have then 'appeared on the face of the information' that the trial court did not have jurisdiction of the cause. But there is a wide distinction between an information which shows on its face that a court has not jurisdiction of the particular cause, and

an information which fails to show that the court has jurisdiction of such cause—it does not appear on the face of this information that the trial court did not have jurisdiction. Except where the place of an alleged offense is a material element of the offense, an information setting forth such offense can, because of an omission to allege the place thereof, be attacked by demurrer only; and so attacked because it did not conform to the requirement of Section 4725, R. C. 1919, that an information should disclose, 'that the offense charged was committed within the jurisdiction of the court, or though without the jurisdiction of the court, is triable in that particular court'."

The views of Justice Whiting in respect to this matter were approved by the South Dakota Supreme Court in the second appeal of Egan's case. *State vs Egan* 195 N. W. 642. It will be seen from the opinion of Justice Whiting that, under the South Dakota practice and statutes, "Except when the place of an alleged offense is a material element of the offense, an information setting forth such offense can, because of an omission to allege the place thereof, be attacked only by demurrer." In spite of the opinion of the South Dakota Court, we find Judge Reeves saying in his opinion below with respect to the construction to be given said statutes, "Nor are conclusions of the Supreme Court in this regard sustained." Manifestly this is a wrong view and the construction to be placed upon the South Dakota practice statutes are concluded by the decision of the South Dakota Supreme Court. *In re Duncan* 139 U. S. 449, 35 L. Ed. 219.

The requisites of a demurrer are prescribed by statute. See Section 4772, Appendix page 61. It must be in writing and filed. It is a dilatory plea and hence must be made before a plea to the merits. When brought to trial in 1920, Egan chose to plead "not guilty," instead of challenging the form of the in-

formation. The excerpt from the record of the first trial of Egan (R page 114, paragraph third) shows that this course was deliberate. When brought to trial two years later, a second time, he appealed to the discretion of the court to be allowed to withdraw his plea of "not guilty," for the purpose of demurring. The trial court in the exercise of its discretion was of the view that at that late stage in the prosecution, and after Egan had speculated upon the result of one trial under his plea to the merits, he ought not to be allowed to do this, and his request was denied. The fact was that he had failed to demur, and his rights were fixed under the statutes. Any error in the ruling of the court upon this discretionary matter, even assuming there was an abuse of discretion, cannot be made the basis of an attack upon the jurisdiction of the Court.

It should be borne in mind that the question to be considered is only as to the form of the information, and the right of the Court to proceed thereon. The only jurisdictional question involved is whether the Court had the right to entertain the information and try the accused thereon. We have here an information, the use of which is authorized under certain circumstances by the statutes of South Dakota. The information is not a void and useless paper if it may be used when the prescribed circumstances exist. We have this information presented to a court of general jurisdiction, which in the exercise of its jurisdiction found that the circumstances that make proper the use of an information in such form existed in Egan's case. Having been vested with authority to inquire into the sufficiency of the information, a determination by the court even though erroneous, is not a void act, but only subject to correction in proceedings to review its determination. We assert with confidence, therefore, that this information is not a nullity and the conviction of Egan based thereon not void.

PROPOSITION III.

*Habeas Corpus Cannot Be Used To Test Sufficiency of Information*

It is a general rule established by the authorities that Habeas Corpus cannot be used to test the sufficiency of an indictment or information. This is done by demurrer, motion to quash, arrest of judgment, and like procedure. If the sufficiency of the pleading could be reviewed in Habeas Corpus proceedings, it would make the writ perform the function of a writ of error or review. For this reason, the authorities have established the rule that where the pleader in an information has attempted to state an offense known to the law, such information will not be regarded as void, and the action of the court thereon as void. Where there is an information sufficient to invoke the judicial discretion of the court in dealing with it, even though defective in essential particulars, it is not a void information, nor is the action of the court thereon void.

Leonard vs State 93 So. 56, 18 Ala. App. 427.

Strickland vs. Thompson 116 S. E. 593, 135 Ga. 125.

Ex Parte Kaster 198 Pa. 1029, 52 Cal. App. 454.

Ex Parte Robinson, 75 So. 604, L. R. A. 1918 B. 1148.

Tullis v. Shaw 83 N. E. 376, 169 Ind. 662.

Bopp vs. Clark 147 N. W. 172, 165 Ia. 697.

State vs. Riley 133 N. W. 86, 116 Minn. 1.

Ex Parte Grubbs 30 So. 708, 79 Miss. 358.

Ex Parte Siegel 263 Mo. 375, 173 S. W. 1.

Guginon vs. State 163 N. W. 858, 101 Neb. 587.

People vs. Knott 176 N. Y. S. 321, 335.

People ex rel Friedman vs. Hayes 158 N. Y. S. 949.

Application of Moriarty 191 Pa., 360, 44 Nev. 164.

Ex Parte Hill 156 Pa. 686, 12 Okla. Crim. 335.

Ex Parte McKay 199 S. W. 637, 641, 82 Tex. Crim. 221.

Ex Parte Turner 102 Atl. 943, 946, 92 Vt. 210. 210.

In Ex Parte Kaster, 198 Pa. 1029 (Cal.) *supra*, it is stated, "If the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie." In Ex Parte Robinson, *supra*, it is stated, "The true rule seems to be that it is only where the facts stated in the indictment are not and cannot be so stated as to charge an offense that the prisoner may be discharged, and where the matters are of such character that the indictment, though defective for lack of a statement of an essential ingredient of the offense, may be perfected into a sufficient accusation of crime, the prisoner should be held to abide the judgment or order of the court." In Leonard vs. State, the indictment did not show venue, but the court said:

"The demurrers to defendant's plea as to the jurisdiction of the court to try this case were properly sustained, as it is not necessary to allege specifically in an indictment where the offense complained of was committed; but it must be proven upon the trial of the case to have been committed within the jurisdiction of the court in which the indictment is preferred."

In the Iowa case, Bopp vs. Clark, *supra*, the court held that jurisdiction was not lost through a defective information. In this case the court said:

"It is further urged by the appellant that the information failed to charge any offense in that it stated no sufficient facts, but stated legal conclusions only. If the information is not sufficiently specific, it is amendable. Proceedings are not thereby rendered void by reason of its insufficiency. If they were,

they could not be saved by amendment. The jurisdiction of the criminal court over the defendant after his arrest is not lost by mere defect in information or indictment. This is illustrated by the provisions of our statute which authorize the district court to hold a defendant pending the return of a second indictment, where the prosecution against him has failed for insufficiency of a prior indictment."

The statutes of South Dakota are much the same as the Iowa statutes in the respect noted in the above case. When an objection to the sufficiency of an information is made by motion to quash, demurrer, or motion in arrest of judgment, the court is required to determine whether the defect may be remedied and if so to hold the defendant and order an amendment of the pleading by the filing of a new information. See Sections South Dakota Code, (Appendix pages 663). If the court does not order the filing of a new information, a prosecution of the offense is forever barred. It would be a strange situation that the inadvertent omission to state the county in which the offense was committed would result in preventing the court from ordering the filing of a new information, and thus barring a prosecution of the accused. Yet if the court has jurisdiction to do this, the filing of the information and the action of the court thereon is not a void thing and subsequently proceedings of the court upon such information are not entirely void.

The case of *Guignon vs. State* (Neb.) 163 N. W. 858, is an instructive case on this proposition. Two defendants were informed against for aiding and abetting a felony. While the felony was alleged to have been committed in a designated county, there was no allegation that the acts of the defendants in aiding and abetting the commission of that felony were had in that or in any other county. The pleading was silent as to where their acts were committed. The court says, "If the defendant made no objection to the form of information and pleaded not guilty,

he cannot wait until he sees whether he is acquitted before he makes the objection which he here seeks to make. Because he failed to object, he waived the objection which he might perhaps have made at the proper time. While the information does not affirmatively show that the robbery was committed in Hall county, no objection was made until after the trial. It comes too late at this time."

If an information is void which does not state venue, the defendant cannot waive the defect. The principle of waiver announced by the Nebraska court necessarily implies that the information was only voidable. If the information without venue went to the jurisdiction of the court, the defendant could not waive the defect.

A uniform line of Federal decisions are to the effect that the sufficiency of an indictment cannot be reviewed in Habeas Corpus proceedings.

Ex Parte Parks 93 U. S. 18, 23.

In re Coy 127 U. S. 731, 758, 759.

Caldwell vs. Texas 137 U. S. 692.

United States vs. Pridgeon 153 U. S. 48.

Bergman vs. Backer 157 U. S. 655.

Kohl vs. Tehlback 160 U. S. 293.

Howard vs. Flemming 191 U. S. 126.

Dimmick vs. Thompson 194 U. S. 540, 552.

Barrington vs. Missouri 205 U. S. 483, 487.

Matter of Gregory 219 U. S. 210.

Ormsby vs. U. S. 273 Fed. 977.

Moust vs. Warden 283 Fed. 912.

In Bergman vs. Backer, *supra*, it was said:

"If an indictment in a state court, under statutes not void under the constitution of the United States, be defective according to the essential principles of criminal procedure, an error in rendering judgment upon it, even if the accused at the trial objected to it as insufficient, will not be made the basis of jurisdiction in a court of the United States to issue a writ of habeas corpus."

It was held in *United States vs. Pridgeon*, 153 U. S. 48, 59, that an indictment which does not show affirmatively that the offense which it purports to charge was committed without the jurisdiction of the trial court will sustain a conviction as against collateral attack by way of habeas corpus even though on demurrer or writ of error it might be found defective in not alleging the place where the offense was committed. The opinion states, "But, whether this be so or not, it is very clear that there is nothing on the face of the indictment to show affirmatively that the district court for the First Judicial District, within and for Logan county, Oklahoma territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States, did not have jurisdiction of the offense for which Pridgeon was convicted, so as to render its sentence void on collateral attack. If the indictment does not fairly and sufficiently aver that the offense in question was committed in the Cherokee Outlet, it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court. It may be, that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offense was committed, within the rule laid down in *McBride vs. State*, 10 *Humph.* 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The habeas corpus proceedings being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offense of which the court had no jurisdiction, so that its sentence was void. This does not appear in the present case, and the second question certified must, therefore be answered in the negative."

The United States Supreme Court has thus in

the above case laid down the rule by which it may be determined when venue in an information is jurisdictional. If the information clearly places the commission of the offense outside the jurisdiction of the court, so that it affirmatively appears that the court has not jurisdiction, the information is void, and proceedings of the court thereunder are void. If the information simply fails to show the jurisdiction of the court, same is not void, the court's action thereon is not void, and it is not a jurisdictional defect. The rule thus announced ought to effectually dispose of petitioner's contention as to the defect in the information in his case. Failure to allege venue is not jurisdictional.

Neither the sufficiency of the information, nor whether it shows on its face that a crime is not charged, can be reviewed on habeas corpus. *Ormsby vs. U. S.*, 273 Fed. 977.

In *Moust vs. Warden*, 283 Fed. 912, a decision of the Circuit Court of Appeals of the Eighth Circuit, it was held that a defect in an indictment for murder that would have shown jurisdiction only by alleging that the murdered man was an Indian, but in fact was silent as to his nationality, could not be reached by habeas corpus after conviction. The court said: "It may be conceded that an indictment charging such an offense against a white man might be successfully challenged in limine, if it did not appear that the one murdered was an Indian; but if it be not so charged and the indictment be not challenged, and it appear on the trial that the person murdered was an Indian, the United States court sitting within a state would have jurisdiction of the offense. It does not appear from this indictment that Batemen was not an Indian. But in either event, the question whether the trial court had or did not have jurisdiction on that account was one for its inquiry and determination. It had authority to hear and pass upon that question of fact, and its decision could have been reviewed by writ of error, but it cannot be attacked

collaterally. *Toy Toy vs. Hopkins*, 212 U. S. 542, 29, Sup. Ct. 416, 53 L. Ed. 644."

In *Goto vs. Lane*, 265 U. S. 393, 402 the indictment was attacked as insufficient. Mr. Justice Van Devanter, speaking for the Court said:

"The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not, for that reason, void (*Ex parte Watkins*, 3 Pet. 193, 203, 7 L. ed. 650, 653; *Ex parte Parks*, 93 U. S. 18, 20, 23 L. ed 787, 788; *Ex parte Yarbrough*, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152), but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76. And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute. *Riddle v. Dyche*, 262 U. S. 333, 67 L. ed. 1009, *Craig v. Hecht*, 263 U. S. 255, 68 L. ed. 293, 44 Sup. Ct. Rep. 103."

The principle of the foregoing authorities is that a court of competent general jurisdiction is invested with authority to determine the questions of law and fact upon which its jurisdiction depends. The case of *Toy Toy vs. Hopkins* referred to in *Moust vs. Warden*, supra, involved an Indian who had been convicted of murder in the Federal Circuit Court for the District of Oregon, and sentenced to life imprisonment. The jurisdiction of the Federal Court depended upon its finding that the crime had been committed within Indian territory. Five years after conviction he sought release by habeas corpus claiming that it could be shown that the place of the crime, though

within an Indian Reservation was upon land that had been conveyed by the United States by patent in fee, and hence was not "Indian Territory" of which the United States Court had jurisdiction. The United States Supreme Court sustained the Federal Circuit Court in denying the application for the writ, saying:

"If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which, on the merits, we do not hold, the circuit court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and habeas corpus cannot be availed of as a writ of error. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. \* \* \* In many cases jurisdiction may depend on the ascertainment of facts involving the merits; and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

This principle was emphasized in the very recent case of *Rodman vs. Pothier* 264 U. S. 399, 402, 68 Law Ed. 759, where this Court said:

"Barring certain exceptional cases (unlike the present one), this court has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment of the validity of the statute on which the charge is based. These and all other controverted matters of

law and fact are for the determination of the trial court.' *Henry v. Henkel*, 235 U. S. 219, 229, *Louie v. United States*, 254 U. S. 548."

In *United States vs. Valante*, 264 U. S. 563, 68 L. ed. 850, Valante contended that his right of trial by jury guaranteed him by the federal constitution had been violated because in the prosecution of him for a crime, the verdict of the jury had been received by a judge other than the one who had presided at the trial. This Court reversed the District Court, saying:

"Without intimating that there is anything of substance in this contention, it is clear that the error, if any was committed, did not go to the jurisdiction of the court, or render the judgment void, but was, at the most, one which could have been corrected on a review by a writ of error. It is 'the well-established general rule that a writ of habeas corpus cannot be utilized for the purpose of proceedings in error.' *Craig v. Hecht*, 263 U. S. 255, 277, and cases there cited. And see *Riddle v. Dyche*, 262 U. S. 333, 335. There are no circumstances in the present case sufficiently extraordinary to bring it within any class of 'exceptional cases,' or make 'the general rules of procedure' inapplicable. *Craig v. Hecht*, *supra*, p. 277."

Judge Reeves appears to have relied almost wholly for authority to sustain his action upon the cases *Ex Parte Van Moore*, 221 Fed. 968, and *Yohyowan vs. Luce* 291 Fed. 425. Each was a case where the petitioner was imprisoned under a judgment of a state court, but the conceded facts showed that the state court was wholly without authority or jurisdiction to act, and its judgment void. In each "exceptional circumstances" were found which justified action by habeas corpus rather than writ of error. In the *Van Moore* case petitioner had been imprisoned for nearly fifteen years under the accepted view of the law by the state court, which view in a recent

case had been found to be erroneous by the Supreme Court of the United States. In the latter case, petitioner was an Indian and a ward of the Government, without means to pursue his remedy by writ of error. In the instant case, no facts, either conceded or controverted, are shown which make the judgment of the state court void, or indicate that the state court had not jurisdiction both of the cause of action and the person of Egan. The claim alone is that there was a defective statement of the cause of action. No claim is made that the defective information could not have been perfected into a sufficient accusation, nor that the alleged criminal act was not actually performed within the jurisdiction of the Court.

This is an ordinary habeas corpus case without "exceptional circumstances." While Egan yet had his right to a review by writ of error, he chose to proceed by habeas corpus, and to attempt to make a habeas corpus proceeding serve the function of a writ. That now it is too late to avail himself of the proper remedy is not a consideration why this court should relieve him from the situation in which he has voluntarily placed himself. *Craig vs. Hecht*, *supra*.

Counsel for petitioner cited to the District Court a large number of cases, the opinions in which were to the effect that an allegation of place or venue is jurisdictional. Most of these cases were decided upon a review by writ of error or appeal. They were not habeas corpus cases, where the question is,—Was the pleading and the action of the Court thereunder absolutely void. It should be borne in mind also that the jurisdiction of a particular court depends upon the law creating and giving that court authority. Doubtless in some states the statutes are to the effect that a court can proceed against a person accused of crime only upon an accusation which sets forth the venue of the offense within the jurisdiction of the court. The statute stands as an absolute bar to the court proceeding further unless there is such a plead-

ing. A statute of this nature would affect and limit the jurisdiction of the court. We have reviewed the South Dakota statutes, and find that they authorize the use of an information which does not allege venue, when the accused does not demur thereto.

In this connection the opinion of the court in the great case of *Frank vs. Mangum*, 237 U. S. 309 is exceedingly instructive. While the opinion of the court upon the question of the effect of mob domination of the trial court was modified in the recent case of *Moore vs. Dempsey*, the views of the court upon the other questions in the case have never been challenged. There was involved in the case of *Frank vs. Mangum* the effect of the absence of the accused upon receipt of the verdict of the jury and the polling of the jury. It was contended that the court lost jurisdiction because of the absence of the accused during a portion of the trial. It was conceded that under the laws of Georgia the accused had the right to be present at all stages of the trial. The Georgia court held that because the accused knew that the verdict was received in his absence and made a motion for a new trial before the trial court without including that as one of the grounds for a new trial, he could not later attack the judgment of the court as void; that he had waived his right by failing to make objection at the proper time. The Supreme Court of the United States approved this as a reasonable regulation of procedure. *Id.* 340. The opinion points out the difference between a statute which confers personal rights that may be waived, and a statute like that involved in *Hopt vs. Utah*, 110 U. S. 574, where there was a "violation of the plain mandate of the local statute" that prescribed the power of the court to proceed. *Id.* 340, 341. The opinion also points out that a court has not lost jurisdiction, when it still has the power and authority under the statute to proceed against the accused. *Id.* 339. This is the doctrine in the Iowa case, *Bopp vs. Clark* 165 Ia. 697, referred to in this brief.

## PROPOSITION IV.

*Egan Was Accorded Due Process of Law*

By his fourth proposition appellant asserts that Egan in his conviction by the South Dakota Court under the information in question, not only was convicted by a court having jurisdiction, but was accorded that due process of law which is guaranteed him by the Fourteenth Amendment to the Constitution of the United States. The South Dakota statutes provide that an information shall show that the offense was within the jurisdiction of the Court; that the accused may demur to same if it does not; that if he fails to demur he waives this requirement and the Court may proceed to trial and judgment thereon. In other words, the statutes say that in such a case there is a sufficient assertion of the jurisdiction of the court from the bringing of the action entitled as to court and county. Does this procedure deny to an accused due process of law?

The Supreme Court of the United States has declared in numerous decisions that the essentials to constitute due process of law in a criminal prosecution are that there shall be a court created by the law and authorized by the law to act, and that there shall be notice and opportunity to hear given the parties.

Justice Moody in the case of *Twining v. N. J.*, 211 U. S. 78, said:

"We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Penoyer v. Neff*, 95 U. S. 714, 733; *Scott v. McNeal*, 154 U. S. 34; *Old Wayne Life Association v. McDonough*, 204 U. S. 8; and that there shall be notice and opportunity for hearing given the parties, *Hoven v. Elliott*, 167 U. S. 409; *Roller v. Holly*, 176 U. S. 398; and see *Londoner v. Denver*,

210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

In *Garland v. Washington*, 232 U. S. 642, the court says:

"When the essential elements of a court having jurisdiction in which an opportunity for a hearing offered are presented, the power of the state under its methods of procedure is substantially unrestricted by the due process clause of the constitution. Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Roger v. Peck*, 199 U. S. 425, 435, and previous cases in this court there cited."

In *Jordan v. Mass.*, 225 U. S. 167, Justice Lurton speaking for the court said:

"That the procedure in this was in conformity with the constitution and law of Massachusetts is determined by the judgment and opinion of the Supreme Judicial Court. Subject to the requirements of due process of law, the states are under no restriction as to the method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, \* \* this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law'."

In *Louisville & Nashville Ry. Co. v. Schmidt*, 177 U. S. 230, 236, we find:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Here are some of the matters the Supreme Court has said are not essential to constitute due process of law. In *Hurtado v. California*, 110 U. S. 516, the right of a state by statute to abolish the grand jury and substitute prosecution by information was sustained. In *Hallinger v. Davis*, 146 U. S. 314, a statute was upheld permitting the grade of an offense to be tried by the court when jury trial was waived by the accused.

In *Allen v. Ga.*, 166 U. S. 138, the action of the Supreme Court of the state in dismissing of writ of error in a criminal case as a penalty for the accused having become a fugitive from justice, was sustained. In *Brown v. N. J.*, 175 U. S. 172, a statute providing for trial of a criminal case by a struck jury was sustained. In *Maxwell v. Dow*, 176 U. S. 581, a statute providing for a jury of eight persons was sustained. In *Simon v. Craft*, 182 U. S. 427, a statute of Alabama was upheld which provided that a person alleged to be of unsound mind might be excluded from being present at the trial of the question of her sanity. In *Howard v. Kentucky*, 200 U. S. 164, the state court was upheld in sustaining a conviction where the accused had been occasionally absent during the trial. In *Feltz v. Murphy*, 201 U. S. 123, 129, the conviction of a deaf person of the crime of murder who did not hear a word of the proceedings, and was not apprised of what occurred, was upheld. In *Twining v. N.*

Jersey, 211 U. S. 78, it was held that the state by legislation might remove the exemption from self incrimination ordinarily conferred upon an accused and that such legislation does not violate the due process clause of the Federal Constitution. In *Jordan v. Mass.*, 225 U. S. 167, a situation was involved where one of the jurors had become insane shortly after the conviction of an accused. An inquiry was conducted to determine the sanity of such juror at the time of the trial, and under the Massachusetts procedure this was determined by a preponderance of evidence only and not beyond a reasonable doubt. This procedure was sustained. In *Garland v. Wash.*, 232 U. S. 642, a conviction was upheld where the accused was neither arraigned nor had he pled to the information. In *Frank v. Mangum*, 237 U. S. 309, a rule of procedure invoked by the state court by which the accused was held to have waived, by failing to make the objection in his motion for new trial, the mandatory provisions of the Georgia statute requiring the presence of the accused at all times during the course of the trial, was sustained. In this case Justice Pitney said: "There is nothing in the 14th amendment to prevent a state from adopting and enforcing so reasonable a regulation of procedure." *Id.* 339, 340. Mr. Justice Holmes, who dissented in this case on the effect of the alleged mob violence did not dissent on this proposition, but on the other hand stated: "We never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States." *Id.* 346.

Nor do we find that statutes which dispense with an allegation of venue in the body of the indictment or information, where place is not an essential ingredient of the offense, are novel in statute law. England in 1851 passed a statute dispensing with the statement of venue in the body of the indictment, providing that a setting down of the county in the margin is sufficient. 1 Bishop New Criminal Procedure, Secs.

368, 385. There are similar statutes in a number of states of the Union. Section 4902 of the Code of Alabama of 1896 provides as follows:

"It is not necessary to allege where the offense was committed; but it must be proved on the trial to have been committed within the jurisdiction of the county in which the indictment is preferred."

This statute has been sustained by a line of decisions of the Alabama Supreme Court, starting with Noels's case, 24 Ala. 672, wherein the court held that the legislature had the power to dispense with the necessity of averring venue. The court said:

"The accusation of the commission of the crime is the gravamen of the indictment. This cannot be dispensed with; but the particulars as to time, place and circumstances, not constituting essential elements of the crime, may be dispensed with in the indictment by the statute, and be left as a matter of proof as establishing the jurisdiction of the court."

Tennessee has a statute similar to the Alabama statute which was construed by the Supreme Court of that state in *State v. Quartamus*, 3 Heisk, 65. We quote from the short opinion in this case:

"The indictment in this case was quashed by the County Court of Knox County, upon motion of defendant, and the Attorney General appealed in error to this court. The objection to the indictment, which is for profanity, is that it does not allege that the profane words were spoken in Knox County. While the better practice is, in all cases, to state the venue in the body of the indictment, by Section 5125 of the Code, it is provided that 'It is not necessary for the indictment to allege where the offense was committed, but the proof shall show a state of facts bringing the offense within the jurisdiction of the county in which the indictment was preferred.'

"This section of the Code is not in conflict with the 9th section of Article 1 of the Constitution, which declares that the accused has a right to demand the nature and cause of the accusation against him and to have a copy thereof. These are fully set out in the indictment, and the law requires that the proof should show that the offense was committed in the county in which the indictment was preferred.

"It was therefore error to quash the indictment for the omission in the indictment to charge in which county the offense was committed."

Louisiana has a statute providing that it shall not be necessary to state any venue in the body of the indictment, but the venue named in the margin shall be taken to be the venue for the facts stated in the body of the indictment. See Sec. 1062, R. S. Another statute provides that no indictment shall be held insufficient for want of a proper or perfect venue. 1064, R. S. These statutes have been uniformly upheld by the Supreme Court of that State. *State v. Wood*, 136 La. 658, 67 So. 542.

Missouri has similar statutes, 5107 and 5115, Rev. St. 1909. See *State v. McDonough* 232 Mo. 219, 134 S. W. 545.

Massachusetts has a statute, Sec. 20, Chapter 218, Rev. Laws, which provides:

"The time and place of the commission of the crime need not be alleged unless it is an essential element of the crime, . . . the name of the county and court in the caption shall, unless otherwise stated be considered as an allegation that the act was committed within the territorial jurisdiction of the court."

This was construed and upheld in *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421. This statute also came before the United States Supreme Court in *Hogan v. O'Neill*, 255 U. S. 52, 61 L. ed. 497.

As will be seen, the statutes of two states, Alabama and Tennessee, dispensed with an allegation of venue entirely. The statutes of the other states provide that a statement of venue may be dispensed with in the body of the pleading, and the venue shall be considered as laid in the margin or caption. The South Dakota statute provides that an allegation of venue may be dispensed with under certain conditions where here exist.

Moreover, under the authorities there is a sufficient allegation in the information that the offense was committed within the jurisdiction of the state. The information is entitled in the state of South Dakota, and the action is brought in the name of the state of South Dakota; the charge is made therein by the state's attorney of Minnehaha County, South Dakota, and the offense is alleged to have been committed against the statute and the peace and dignity of the state of South Dakota.

Bishop in his *New Criminal Procedure*, Second Edition, Section 383, states as follows:

"Allegation of State.—It is customary to write the name of the state in the margin, in connection with that of the county. But the former need not appear either there or in any other part of the indictment, unless required by the terms of the constitution or a statute." He states the following authorities among others in support of the proposition: *State v. Walter*, 14 Kan. 375; *State v. Simpson* (Me.), 39 Atl. 287; *Com. v. Quinn* (Mass.), 5 Gray 478; *State v. Wentworth*, 37 N. H. 196, 220; *State v. Jordan*, 12 Tex. 205.

Bishop in the above work has an interesting discussion of the historical origin of venue, *Id.* Section 362, Seq. He points out that jurors originally were chosen from the immediate neighborhood where the offense was committed for their knowledge of an offense. Hence the requirement by the common law

was originally that the indictment must designate the particular locus of the offense. Later, as jurors lost their character as witnesses, and became simply judges of the facts, they were summoned from an entire county. Hence, the doctrine was modified to make an allegation of the county sufficient. In modern times jurisdiction of courts has been extended beyond the territory limits of counties, and here in South Dakota the jurisdiction of the circuit court extends throughout the state. Upon the principle, then, that the allegation of venue may be as broad as the jurisdiction of the court, an allegation that the offense was committed within the state would be sufficient. In *State v. Walter*, 14 Kan. 374, *supra*, the opinion states:

"Mr. Bishop lays it down thus: 'It is customary in the United States to write the name of the state in the margin, in connection with the name of the county. But there is no need of the name of the state to appear, either in the margin or in any other part of the indictment.' L. Crim. Prac., paragraph 106. The rule as thus stated is supported by the following cases: *State v. Jordan*, 12 Tex. 205; *State v. Lane*, r. Iredell, 113; *Com. v. Shaw*, 7 Metc. 52; *Com. v. Quinn*, 5 Gray 478. In this case we need not go as far as these authorities justify, for the offense is alleged as against the peace and dignity of the state of Kansas, which could not well be true unless the offense was committed within the state." Under the above authorities, the information in this case was certainly sufficient to inform the defendant that it was claimed that the offense was committed within the state of South Dakota.

The effect of the South Dakota statutes with respect to setting forth the venue in the information, is that ordinarily such information should affirmatively state the facts that show the alleged offense was committed within the jurisdiction of the Court. But if the accused does not demur thereto, the Court may proceed to try him. The filing of the information in

the Court without the accused challenging the form of the information in the way pointed out by statute, is regarded as a sufficient assertion of the jurisdiction of the Court.

Tested by the rules and principles laid down by the United States Supreme Court for due process of law, we find in our case that South Dakota has by law created a court and given it authority by law to try and determine offenses against the laws of the state. We find that the South Dakota court proceeded in accordance with the statutes enacted to govern its procedure. Jurisdiction comes from the law. Here was a court created under the law and acting under the law. The circuit court had jurisdiction to try Mr. Egan for the offense charged in the information. The essential that there shall be a court having jurisdiction to act existed in the present case.

The other essentials are notice and an opportunity to be heard. Were these elements lacking in the present case? As has been seen, the accused was given notice by the information that he was charged with a violation of the statute of South Dakota. The filing of the information in the Circuit Court of Minnehaha County was notice to him that that Court claimed jurisdiction of the offense. The facts constituting the offense were stated in the information. If there were any matters relating thereto upon which he needed information in order to prepare for his defense, according to the established procedure in South Dakota, he might demand and secure a bill of particulars of such matters. *State v. Otto*, 38 S. D. 353; 161 N. W. 342. In *Hodgson v. Vermont*, 168 U. S. 262, the United States Supreme Court in sustaining a prosecution in a state court referred to the right which the accused had to secure a bill of particulars of the charge. The court said:

"The defendant being entitled to a specification as a matter of right, under the decision of the Supreme Court of the state, the question of the

validity of the information in the absence of any specification is not presented by this case."

In addition the Supreme Court of the State of South Dakota had adopted rules to guide trials in the circuit court pursuant to the requirement of a statute. (Chapter 163, Session Laws 1919.) Such rules were published in Vol. 1, S. D. Revised Code 1919. Rule 24 thereof provides as follows:

"In criminal cases, the jury having been duly impanelled, the trial must proceed in the following order:

"(a) The State's Attorney must read to the jury the indictment or information and state the plea of the defendant, and also state to the jury without argument, the general nature of the evidence upon which the state will rely to secure a conviction."

The rules of court have the force of substantive law.

Presho State Bank vs. N. W. Milling Co., 45 S. D. 14, 185 N. W. 370.

Thus, the established procedure is ample in providing means for fully informing the accused of the nature and cause of the accusation. Petitioner did not at the trial demand a bill of particulars. He did not by his objections to the information suggest that he was not fully informed as to the particulars of the charge. His objection went merely to the technical sufficiency of the information to give the court jurisdiction. The case was tried upon the theory that the offense was alleged to have been committed in Minnehaha county, South Dakota. The trial judge so instructed the jury, and required the jury to find that fact established by the evidence as a condition of returning a verdict of guilty. (R. 88, 92). The accused had a full opportunity to be heard upon this as upon every other issue of fact involved in the charge. He does not claim that he did not have a fair trial. His objection is simply to the technical sufficiency of the information. Petitioner's objections are of the tech-

nical character characterized by the late Mr. Justice Day in *Garland vs. Washington*, 232 U. S. 642, in the following language:

"Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away.

\* \* \*

The Court also said elsewhere in the opinion in *Garland vs. Washington*, *supra*:

"Due process of law, this court has held does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Rogers vs. Peck*, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. The objection was merely a formal one, was not included in the general language in which the objection to the introduction of evidence was interposed before the trial, and was evidently re-

served with a view to the use which is now made of it, in an attempt to gain a new trial for want of compliance with what in this case could have been no more than a mere formality."

In the present case the objection by the accused to the introduction of evidence was entirely a technical objection to the form of the information. He objected to the jurisdiction alone because of the form of the information. He did not object that the court did not have jurisdiction over the subject matter of the action. He did not object on the ground that the information had misled him in any way, or was calculated to mislead him. He did not by his objection suggest to the court that he did not know where the state claimed the offense was committed. A suggestion of this nature would have brought a bill of particulars, to which accused was entitled upon request. *State vs. Otto*, 38 S. D. 353, 161 N. W. 340. He did not suggest that he needed further information in order to prepare for his defense. The case was tried upon the theory that the offense was committed in Minnehaha county, South Dakota, where the action was pending. That was the issue as to place to which the evidence introduced was directed. The instructions submitted this issue as to place to the jury for a finding thereon, and upon which the jury must have found by the verdict of guilty. Paraphrasing Justice Day in his opinion in the *Garland vs. Washington* case, *supra*, the failure of the information in this case to state the venue in no wise changed the course of the trial to the disadvantage of the accused. He had full notice from the information that the offense was claimed to be a violation of the laws of the State of South Dakota and that the Circuit Court in Minnehaha County was asserting jurisdiction to try him for the offense. He had full opportunity to be heard upon the facts that were alleged to constitute this offense. He was tried in a court created by the laws of the state of South Dakota, and given authority by the laws to hear and determine charges of felony. The court proceeded

according to the forms prescribed by the laws of the state. In other words, there were present all of the elements necessary to give due process of law, a court having jurisdiction of the subject matter, a notice to the accused and opportunity to be heard. In view of the foregoing we assert with confidence that it will be held that the accused was not denied due process of law.

#### PROPOSITION V.

At the hearing in the Federal District Court, Egan contended that in his trial in the State Court, the prosecution did not prove the commission of the crime within Minnehaha County, and therefore the State Court was without jurisdiction. Egan did not bring before the District Court the bill of exceptions or settled record which contain the evidence that was presented to the court at the second trial. Over the objections of the respondent he presented to the court the brief of the evidence and law which petitioner as appellant presented to the Supreme Court of South Dakota upon the second appeal. Manifestly this was incompetent as evidence of what was presented to the trial court. This could only be presented by a full transcript of the evidence given in the State Court, or a bill of exceptions of the proceedings. However, the District Court did attempt to make inquiry upon the record presented as to the evidence before the State Court, concluded that no evidence of venue was presented at the trial, and that this ousted the Court of jurisdiction.

The Circuit Court of Minnehaha County is a Court of general jurisdiction. Assuming that the information was not absolutely void, any determination that this Court might make as to the effect of evidence presented to it would not be void, but would be conclusive as against a collateral attack by habeas corpus.

Courts of general jurisdiction are courts which take cognizance of all causes, civil or criminal, of a particular nature. 15 C. J. 718 (2).

The distinction between courts of original and general jurisdiction over any particular subject, and courts of special and limited jurisdiction, is this: the former are competent by their constitution to decide upon their own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the jurisdictional facts and evidence upon which it is rendered. Their records import absolute verity and cannot be impugned by averment or proof to the contrary; there can be no judicial inspection behind the judgment, save by appellate power. 15 C. J. Id.

Where a court of general jurisdiction has exercised its powers, it will be presumed, unless the contrary appears of record, that it had jurisdiction both of the subject matter of the action and of the parties, for, as the first duty of all courts is to keep strictly within the limits of their jurisdiction, any affirmative act on the part of a court implies that it has ascertained that it has jurisdiction so to act. Conversely, no presumption against jurisdiction can be indulged, nor should anything be presumed to be outside of the jurisdiction of a court of general jurisdiction. It accordingly will be presumed that all the facts necessary to give the court jurisdiction to render the particular judgment were duly found, and that every step necessary to give jurisdiction has been taken. 15 C. J. 827 (146).

Upon the question of the review of evidence, in a habeas corpus case, Chief Justice Taft, then Circuit Judge, in *re Haskell*, 52 Fed. 795, said:

"The failure of the state of Ohio to prove the venue of the offense in Lucas county, as alleged by the petitioner can only be made to appear from a consideration of the bill of exceptions stating all the evidence; but the bill of exceptions is not a part of the record of a judgment into which a court may look, in a proceeding where the judgment is collaterally attacked. It is only a part of the record in direct proceedings on error for the examination of a

reviewing court, and can never be considered in habeas corpus to test the validity of the judgment."

This matter has been recently considered by the U. S. Supreme Court in the case of Harlan vs. McGourin, 218 U. S. 442. In this case the court said:

"It is contended that an examination of the bill of exceptions will disclose that the alleged conspiracy was not formed in the northern district of Florida as laid in the indictment; that there is a total lack of evidence to connect the petitioners with any such conspiracy; that the petitioners (notably the petitioner Harlan) are not shown by any competent testimony to have been concerned in any overt act for the carrying out of the alleged conspiracy; that it is not shown that there is any condition of peonage in which Lanninger had been detained and to which he could be returned, in violation of Section 5526 of the Revised Statutes of the United States. In other words, in this feature of the case this court is asked to review the testimony adduced at the trial, with a view to determining the lack of evidence in the record to support the verdict and judgment, although such matters were properly reviewable, and were in fact reviewed, in the error proceedings already referred to.

"The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions."

This case is reported in Vol. 21 of Annotated Cases, page 849, and appended to this case is a note collecting the authorities, which are to the effect that

where a person has been tried by a court having jurisdiction, the sufficiency of the evidence adduced to sustain the conviction will not be reviewed in habeas corpus proceedings.

It may be thought that something has been said by the United States Supreme Court in *Frank v. Mangun*, 237 U. S. 309, or *Moore v. Dempsey*, 261 U. S. 86, which is contrary to the view in *Harlan v. McGourin*, *supra*. In a case later than either of these, *Riddle v. Dyche*, 262 U. S. 333, the court says that in habeas corpus proceedings the court cannot inquire into facts which contradict the record. The court there says the *Frank* case was not intended to decide otherwise.

We do not for a moment concede that there was no evidence in proof of venue. The trial court found the evidence ample, and the Supreme Court upon the appeal also so found. Judge Polley states in the opinion:

"We have the appellant's written and signed declaration that he did present said proof of loss to the agent of the said insurance company in Sioux Falls. On the 10th day of January the day following the day on which appellant made out the said proof of loss, appellant wrote the following letter addressed to

'Firemen's Insurance Company, F. C. Whitehouse & Co., Sioux Falls, S. D. I am handing you herewith a more elaborate and specific proof of loss, estimate of cost of rebuilding, and general information so far as I am able to give it, in connection with the destruction by fire of my building on which you held insurance, November 24th, 1919.'

This letter containing the 'more elaborate and specific proof of loss,' was mailed to and received by said insurance agency in Sioux Falls. This letter uncontradicted was sufficient foundation for the inference that the proof of loss was presented to said

insurance company through its agent in Sioux Falls, Minnehaha County." (47 S. D. —, 195 N. W. 642, 645).

It is to be noted further that Egan does not claim that the proof of loss was not in fact presented to the agent of the Insurance Company in Sioux Falls. He did not offer to prove to the Federal District Court that this was true. If the act was committed there, it was an offense for which the Minnehaha County Circuit Court had authority to try Egan, irrespective of what evidence was presented at the trial. It is plain that the question of what evidence was presented at the trial is not one that affects the jurisdiction of the Court, and cannot become the basis of relief by habeas corpus.

#### PROPOSITION VI.

Egan contended before the District Court that the statute of South Dakota under which he was prosecuted had been repealed by implication by later legislation. An inquiry into this by the Federal Court is precluded by the decision of the Supreme Court of the State. We cite only a few of the many authorities upon this proposition.

In *Re Duncan v. McCall*, 139 U. S. 449, 460, 462.

*Bergemen v. Backer*, 157 U. S. 655.

*Howard v. Flemming*, 191 U. S. 126.

*Farncomb v. Denver*, 252 U. S. 7, 64 L. ed. 424.

*Qwong Ham Wah Co. v. Industrial Accident Commission*, 255 U. S. 445, 65 L. ed. 723.

In *Duncan vs. McCall*, *supra*, the court said:

"The State of Texas is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have no binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of

the United States, and raises no federal question giving the courts of the United States jurisdiction."

In *Howard v. Fleming*, 191 U. S. 126, we find the following:

"We premise that the trial was had in a state court, and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States. The highest court of the state has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial.

"The first contention demanding notice is that the indictment charged no crime. As found it contained three counts, but the two latter were abandoned, and therefore the inquiry is limited to the sufficiency of the first. That charged a conspiracy to defraud. There is in North Carolina no statute defining or punishing such a crime, but the supreme court held that it was a common-law offense, and as such cognizable in the courts of the state. In other words, the supreme court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the supreme court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense."

The same principle applies to all questions of construction of State Statutes involved herein. Were these open to review in this court, we would be quite ready to meet the issue upon the merits, as we did in the State Court. Not being at issue, we forbear further discussion.

#### PROPOSITION VII.

*Motions to Substitute and to Intervene.*

There has been filed by the attorneys for appellant

a Motion to Substitute for the appellant of record, Vincent L. Knewel, as Sheriff of Minnehaha County, his successor in office, George Boardman. The latter succeeded to that office on January 6, 1925. There was also filed by the Attorney General of South Dakota and by the attorneys of record for appellant in behalf of the state of South Dakota, a Motion on the part of the state to be allowed to intervene and become a party to this suit. The basis of the Motion to Intervene is the interest that the state had in the habeas corpus suit, it appearing that Egan had been convicted of a crime and sentenced to imprisonment and was in custody by virtue of the judgment of the State Court. It furthermore appeared from the affidavit of Byron S. Payne, (Appendix page 65) filed in support of the said Motions, that the State had appeared in the District Court in the habeas corpus suit by its Attorney General and other counsel representing it, and had borne the entire cost of defending against the application of Egan for a release from custody, and had through its counsel and law officer taken this appeal and borne the cost thereof. These Motions were submitted to the Supreme Court on January 26, 1925, and an order later was made continuing the hearing thereon until April 13th, next, in connection with the argument and hearing on the merits of the case on that date.

In support of the Motion to Substitute Boardman as a successor in office to Knewel, Section 2317 of the South Dakota Code was cited, and reference was made to *Thompson v. U. S.*, 103 U. S. 480, 484; also to 1 C. J. 146, Sec. 230. It was thought at the time the Motion was presented that the case now before the Court, so far as the officer was concerned, involved the discharge by him of a continuing duty as Sheriff of Minnehaha County, and that duty having devolved upon his successor, the latter would be a proper party to this suit. Our attention is now called to the cases *Gorham Mfg. Co. vs. Wendell*, 261 U. S. 1, and *Irwin vs. Wright*, 258 U. S. 219. In these cases it is stated:

"A suit to enjoin a public officer from enforcing a statute or to compel him to act by mandamus is personal, and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office." It was said further therein that the Federal Courts can avail themselves of any state provision for substitution for retiring state or county officers of their successor in office in such suits. In *Gorham Mfg. Co. vs. Wendell*, it was further stated that where such officers consent to the substitution, the Federal Courts need not be astute to enforce the abatement of the suit if any basis at all can be found in state law or the practice of the state Courts for substitution of the successors in office. In that case, the practice of the State Courts in allowing substitution as shown by a decision of the State Court was accepted as a sufficient basis for the substitution in the Federal Court.

In *Irwin vs. Wright*, *supra*, a statute of New Mexico, similar to Section 2317 of the South Dakota Code was considered and held insufficient to justify the substitution of a successor in office.

The Courts of many states under statutes similar to the South Dakota statute approve the substitution of a successor in office for a defendant in mandamus and injunction cases.

*People vs. Treasurer*, 37 Mich. 351.

*Stone vs. Bell*, 35 Nev. 240; 129 Pac. 458.

*Otto Hdwe. Co. vs. Holmberg*, 36 Cal. App. 402; 179 Pac. 422.

The California Court in the above case refers to Sec. 385 Cal. Code of Civil Procedure, which is in the exact language of Sec. 2317 of the South Dakota Code. The California Code is the older, and it is known that the South Dakota procedure statutes were based upon the California Code.

We have been able to find no decision of the South Dakota Supreme Court expressly approving the practice of substituting the successor in office for the de-

fendant in mandamus and injunction cases. However, it is the observation of the writer of this brief as a practitioner before the Courts of South Dakota for a period of twenty years, that the practice of permitting either the substitution of the successor in office in such cases, or the continuance of the case in the name of the officer against whom the action was originally brought, even though he had retired from office, has been generally accepted by the bar of the state and by the courts as the approved practice. As an example of the acceptance of this practice by the bar of the state, we refer to the case of Wells Fargo and Co. vs. Johnson, State Treasurer. This was an action in the Federal District Court, District of South Dakota, by an express company to restrain the State Treasurer of South Dakota from enforcing a taxation statute. Johnson left office in January, 1913, and the case was tried on February 19, 1913, after he had actually left office. See opinion of the District Court, 205 Fed. 60. Decision was for the defendant. The express company appealed to the Circuit Court of Appeals and the decision was reversed. 214 Fed. 180. Appeal was then taken by the authorities of South Dakota to the Supreme Court of the United States, and the case decided November 29th, 1915, nearly three years after Johnson had left office. See Johnson vs. Wells Fargo and Co., 239 U. S. 234. We do not claim that Johnson's retirement from office was suggestive to the Supreme Court, but cite the carrying on of this litigation by leading practitioners of the state in the name of the officer who had retired from office as evidence of the practice accepted by the bar of the state.

However, this is not a mandamus or injunction suit, and we believe without question, this is not a suit which does abate because Knewel has left the office of Sheriff. Habeas corpus is an extraordinary remedy to inquire into the cause of the detention of a person restrained of his liberty. It is a proceeding of a civil nature, was known to the Common Law, and is regulated in the Federal Courts by Federal statutes.

A most instructive discussion of the nature of the proceeding is found in *Simmons vs. Georgia Iron and Coal Company*, 117 Ga. 305; 43 S. E. 780; 61 L. R. A. 739.

"The proceeding is sometimes characterized as a 'cause' or 'action,' but erroneously so; and it has been called a civil or criminal proceeding, according to whether the person is held in custody on a criminal charge, or by private restraint. While instances may arise where it is important to determine whether it is a civil or criminal proceeding, it can never be accurately characterized as a technical suit or action. See, in this connection, 15 Am. & Eng. Enc. Law, pp. 157, 158; Spelling, Extr. Relief, Sec. 1161. It may be analogized to a proceeding in rem, and is instituted for the sole purpose of having the person restrained of his liberty produced before the judge, in order that the cause of his detention may be inquired into, and his status fixed. The person to whom the writ is directed makes response to the writ not to the petition. 9 Enc. Pl. & Pr. p. 1035. When an answer is made to the writ, the responsibility of the respondent ceases. See in this connection, *Barth v. Clise*, 12 Wall. 400, 20 L. ed. 393. The Court passes upon all questions, both of law and fact, in a summary way. The person restrained is the central figure in the transaction. The proceeding is instituted solely for his benefit. It is not designed to obtain redress against anybody, and no judgment can be entered against anybody. There is no plaintiff and no defendant, and hence there is no suit, in a technical sense. The judgment simply fixes the status of the person for whose benefit the writ is issued; \* \* \* The respondent, in his answer to the writ, seeks simply to justify his conduct, and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty. He comes to no issue with the applicant for the writ. He answers the writ. The applicant may traverse the answer, and thus take issue

with the respondent as to the truth or legal effect of the facts which he sets up. If, upon an investigation into the matter, it appears that the detention was without color of authority the person detained will, of course, be discharged; and he may bring a civil action for damages, or prosecute the person by whom he was restrained of his liberty for false imprisonment. But the proceeding itself is not in any sense a suit between the applicant and the respondent."

By Section 761 of the Revised Statutes (Comp. Stat. Sec. 1239, 3 Fed. Stat. Anno. 2nd Ed. p. 469) the duty of a United States Court in habeas corpus proceedings is prescribed as follows:

"The court, or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

This is an exceedingly broad statute. The command is to dispose of the party as law and justice require. The mandate of the Statute in this particular applies whether the Federal Court is exercising original or appellate jurisdiction. *Storti vs. Mass.*, 183 U. S. 138; 46 L. ed. 120; 22 Sup. Court 72. The proceeding is in no sense a private suit between the petitioner and the officer or person holding the petitioner in custody and to whom the writ is directed. When the person imprisoned is brought before the Court, he is detained solely under the authority of the writ of habeas corpus, and is responsible to the authority of the Court issuing the writ alone. The original authority for his detention is entirely superseded. 12 R. C. L. page 1251, Sec. 69; *Barth vs. Clise*, 12 Wall. 400; 20 L. Ed. 393.

The command of the statute is that such disposition must be made of the matter as law and justice require. The particular custody may be found to be illegal, but that does not entitle the petitioner to a

discharge if other grounds for his detention are shown. *Coleman vs. Tennessee*, 97 U. S. 509; 24 L. Ed. 1118; *Mahler vs. Eby*, 264 U. S. 32, 46; 68 L. Ed. 547, 557. *In re Medley*, 134 U. S. 45; 33 L. Ed. 835; *In re Bonner*, 151 U. S. 242; 38 L. Ed. 149; *United States vs. McBratney*, 104 U. S. 621, 624; 26 L. Ed. 869, 879; 29 C. J. 173, Sec. 195.

Where the person is held by other than the proper authorities, or in other than the proper place, he may be remanded to the custody of the proper authorities for confinement in the proper place. *Givens vs. Zerbst*, 255 U. S. 11, 22; 65 L. Ed. 475, 481; *In re Bonner*, 151 U. S. 242; *United States vs. McBratney*, 104 U. S. 621; *Coleman vs. Tennessee*, 97 U. S. 509.

It will thus be seen that the Court disposes of the party and the matter without reference to the parties before it. Indeed, the statute imposes this duty, the command being to act as law and justice require. The only indispensable party before the Court is the petitioner; all other parties are incidental. In *Ex Parte Milligan*, 4 Wall. 2, 112, there had been no return and there was no adverse party before the Court. See *Ex Parte Watkins* (3 Peters 193, 201) where the matter was disposed of upon the petition without a return. If other parties appear, it is for the purpose of aiding the Court in disposing of the matter rightly. The statute requires the officer who is holding the petitioner in custody to make a return for that purpose. The Court can very properly hear anyone having an interest in the cause of the imprisonment to the same end.

In a case such as this where the petitioner is in custody under a judgment of a state court for a criminal offense, it is generally recognized that the state is an interested party. *State vs. Gordon*, 105 Miss. 454; 62 So. 431; *Keyes vs. Buckham*, 29 Mian. 462; 13 N. W. 912; *Burr vs. Foster*, 138 Ala. 41; 31 So. 495; *State vs. Davis*, 56 Ala. 181; 47 So. 182. See

also, *Ex Parte Milligan*, 4 Wall. 2, 114; and *Durner vs. Huegin*, 110 Wis. 189; 85 N. W. 1046; 62 L. R. A. 700. See also note in 10 A. L. R. page 396e.

So also, the officer from whose custody a person has been discharged on habeas corpus is usually held to be an interested party. *Edmundson vs. Ramsey*, 122 Miss. 450, 84 So. 455; 10 A. L. R. 380; *Yudkin vs. Gates*, 60 Conn. 426; 22 Atl. 776; *State Ex Rel. Berry vs. Merrill* (1901) 83 Minn. 252, 86 N. W. 89; *State Ex Rel. Bond vs. Langum* (1917) 135 Minn. 320; 160 N. W. 858; *Miller vs. Gordon* (1914) 93 Kan. 382; 144 Pac. 272; *State Ex Rel. Durner vs. Huegin*, *supra*; *Palmer vs. Buck*, 83 Mich. 528; 47 N. W. 355. See note to 10 L. R. A. 396e.

In the Federal Courts it has been recognized that the state or government under whose authority the party is imprisoned, as well as the officer who is the particular agency for the detention, each has an interest in the habeas corpus inquiry. *Re Taylor*, 3 McArth. (D. C.) 426; *Leonard vs. Rodda*, 5 App. D. C. 256; *Ex parte Milligan*, 4 Wall. 2, 114; *Ornelas vs. Ruiz*, 161 U. S. 502; 40 L. Ed. 787; *Collins vs. Miller*, 252 U. S. 364; 64 L. Ed. 616. See note in 10 A. L. R. pp. 403, 404h. In the suit *Re Taylor*, *supra*, an appeal taken at the instance of the district attorney, acting under instructions from the Attorney General of the United States, was declared proper. In *Leonard vs. Rodda*, *supra*, the opinion states that the officer rather than the government is the formal party to the record, and an appeal should be taken in the name of the officer. In *Ex Parte Milligan*, *supra*, the appearance of the United States District Attorney in behalf of the government was approved as proper. In *Ornelas vs. Ruiz*, *supra*, the Mexican Consul had made a complaint for the extradition of a fugitive from his country. He was allowed to prosecute an appeal on behalf of his government from a decision in habeas corpus discharging the person accused. The Court said:

"The official character of this officer must be

taken as sufficient evidence of his authority." and that, "As the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf." On the other hand in *Collins vs. Miller*, supra, Mr. Justice Brandeis suggested that the appeal should be taken by the officer from whose custody the petitioner had been discharged, rather than by the representative of a foreign government.

The Federal Statutes provide for an appeal in habeas corpus cases, but do not prescribe by whom such appeal shall be taken. So far as we have been able to ascertain, the Supreme Court under the authority of Section 765 of the Revised Statutes has not formally prescribed the practice for such appeals. The decided weight of authority is to the effect that it is proper for the appeal to be taken in the name of the officer. That was the practice adopted in this case before the Court. The appeal was taken in the name of the Sheriff and at the instance and under the direction of the Attorney General of the state and other counsel representing the state authorities. This Court, therefore, regularly obtained jurisdiction of this cause.

The foregoing review of the authorities and a consideration of the nature of the habeas corpus proceeding and its purpose, and the broad powers and duty conferred upon the Court by the statute, makes it clear that the habeas corpus proceeding does not abate by the Sheriff going out of office. Indeed, the officer is not a necessary party to the proceeding at all. Without regard to who is heard, or who is the formal party to the record, the duty still remains upon this court under the statute to make the inquiry as to the cause of the detention of the party involved, and to dispose of him rightly, according to the law and justice of the case.

However, should it be determined that the custody of Egan by the State authorities was lawful, the duty to retake Egan into custody, and execute the judgment of the State Court, has devolved upon Knewel's successor, Boardman. Since the Motion was submitted

to the Court, Boardman has filed with the Clerk written consent to be made a party to the proceeding. It would seem proper practice to admit him to be heard so that he would be bound by the judgment of this Court, whatever that judgment may be.

On the other hand, the foregoing authorities and considerations would seem to indicate that the State through its legal officer, the Attorney General, and through other counsel representing the State, should properly be heard by the Court in disposing of the case. This does not mean necessarily that the State should be made a formal party to the record, but that its interest in the proceeding should be recognized by allowing the State to be heard.

Counsel are asking that this brief be filed in behalf of the formal appellant to the record, and also in behalf of the State of South Dakota, and in behalf of the said George Boardman, as Sheriff of Minnehaha County, South Dakota, should he be permitted to participate in the case.

### CONCLUSION

This is an ordinary habeas corpus case. The party involved was detained under a judgment of the State Court. To secure relief by habeas corpus, he must show that the judgment was absolutely void, and that the State Court was absolutely without jurisdiction to pronounce it. The judgment is regular upon its face, it was given by a court created by the laws of the state, and given general jurisdiction to determine charges of violation of law. The offense charged is known to the law, and the Court had jurisdiction over the person of the accused. The defects asserted which caused lack or loss of jurisdiction, are, first, as to the form of the information, and second, as to the sufficiency of the evidence presented to the State Court. Neither of these defects reach the question of the jurisdiction of the Court to try the accused for the offense. It is claimed that the information did not state the County in which the offense was alleged to have been committed. We have shown that the filing of the information and the accused's plea of "not guilty" there-

to, without challenging the sufficiency of the information in the mode prescribed by statute, constitutes under the statutes a sufficient assertion that the offense was committed within the jurisdiction of the Court. The Court not only had jurisdiction to proceed upon the information, but it accorded to Egan due process of law in proceeding thereupon. That the Court refused to permit Egan to withdraw this waiver of his right to challenge the form of the information, cannot be made the basis of an attack upon the jurisdiction. That waiver had stood for some two years under which he had elected to speculate upon the result of one trial of his case. Neither can the Court's jurisdiction to hear a cause be made to depend upon the sufficiency of the evidence presented to the Court, nor its jurisdiction be challenged by an attack upon its conclusions relating to such evidence. Habeas corpus is not a proceeding to review rulings claimed to be erroneous.

We submit to this Court that the order of the District Court granting discharge to Egan from custody was clearly wrong and erroneous. That order should be reversed and the District Court should be directed to make an order vacating same and remanding Egan to the custody of the Sheriff of Minnehaha County.

This Brief is submitted in behalf of Knewel, as Sheriff of Minnehaha County, South Dakota, in whose name the appeal to this Court was taken, and in behalf of the State of South Dakota because of its interest in this cause, and also in behalf of George Boardman, successor to Knewel, should he be permitted to become a party hereto.

Respectfully submitted,

BUELL F. JONES,  
Attorney General of South Dakota,  
BYRON S. PAYNE,  
SAMUEL HERRICK,  
J. D. COON,

State's Attorney of Minnehaha County,  
Counsel for the above named parties.

## APPENDIX.

Section 14, Art. 5, Constitution of South Dakota:  
"The circuit courts shall have original jurisdiction of all actions and causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law and consistent with this constitution; such jurisdiction as to value and amount and grade of offense may be limited by law. They and the judges thereof shall also have jurisdiction and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other original and remedial writs with authority to hear and determine the same."

(All the statutes quoted or referred to are from the South Dakota Revised Code of 1919 unless otherwise stated.)

Sec. 4653. "*Criminal Jurisdiction.* The circuit court has exclusive original jurisdiction to try and determine all cases of felony, and original jurisdiction concurrent with the municipal court, and with the county court in counties having a population of ten thousand or over, to try and determine all cases of misdemeanor. It has appellate jurisdiction concurrent with the county court, in counties having a population of ten thousand or over, of appeals from justices' courts in criminal actions triable in such courts. It has jurisdiction to inquire into the cause of detention of all persons imprisoned in the jail of the county or otherwise detained, and to make an order for their recommitment or discharge, or otherwise according to law, and to exercise such other powers as are conferred by the constitution and statutes of this state."

Sec. 4654. "*Always Open for Certain Purposes.* The circuit court is always open for the purpose of hearing and determining all actions, special proceedings motions and applications of whatever kind of character, of a criminal nature, arising under the laws of this state and of which it has jurisdiction,

original or appellate, except issues of fact in criminal cases; and all such actions, special proceedings, motions and applications may be heard and determined at any place within the judicial circuit in which is situated the county wherein the same is brought or pending; but issues of fact in any criminal action must be tried in the county in which the same is brought or to which the place of trial is changed by order of the court: Provided, however, that nothing in this section shall be construed to prevent the judge of any circuit court from making any order at chambers at any place within the state, in any criminal matter properly before him."

Sec. 4655. "*Criminal Actions, How Commenced.* Criminal actions are commenced in the circuit court by the filing of an information founded upon a preliminary examination, or by the filing of a complaint in cases not requiring the intervention of a grand jury or a preliminary examination."

Section 3573, S. D. R. C. 1919, defines a felony:

"A felony is a crime which is, or may be, punishable by death or by imprisonment in the state penitentiary."

Statutes Relating to Procedure:

Sect. 4715. "*Forms of Pleading.* All technical forms of pleading in criminal actions having been abolished, it is necessary to plead only the commission of the offense by its usually designated name in plain, ordinary language."

Sec. 4725. "*When Sufficient.* The indictment or information is sufficient if it can be understood therefrom:

"1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

"2. That the indictment was found by a grand jury of the county in which the court was held.

"3. That the defendant is named, or, if his name is unknown, that he is described by a fictitious name

with the statement that his true name is to the grand jury or state's attorney unknown.

"4. That the offense charged was committed within the jurisdiction of the court, or though without the jurisdiction of the court, is triable therein.

"5. That the offense was committed prior to the time of filing the indictment or information.

"6. That the offense charged is designated in such a manner as to enable a person of common understanding to know what is intended."

Sec. 4726. *Certain Informalities Disregarded.* No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Sec. 4771. *"When Defendant May Demur.* The defendant may demur to the indictment or information when it appears upon the face thereof:

"1. That the grand jury presenting the indictment had no legal authority to inquire into the offense charged by reason of its not being within the legal jurisdiction of the county or *that the court is without jurisdiction of the offense charged.*

"2. That it does not substantially conform to the requirements of this title.

"3. That more than one offense is charged.

"4. That the indictment or information contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other bar to the prosecution."

Sec. 4772. *Requisites of Demurrer.* The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of the objection to the indictment or information or it must be disregarded.

Sec. 4775. "*Effect of Demurrer if Sustained.* If the demurrer be sustained, the judgment is final and is a bar to another prosecution for the same offense, except that where the court is of the opinion that the objection on which the demurrer is sustained may be avoided in a new indictment or information, he shall direct the case to be resubmitted to the same or another grand jury, or a new information to be filed, as provided in Section 4766."

Section 4777. "*Proceedings if Resubmitted.* If the court directs that the case be submitted anew, or that a new information be filed, the same proceedings must be had thereon as are prescribed in Section 4767."

Sec. 4766. "*When Defendant Discharged.* If the motion be granted the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury or that a new information be filed within such time during the term as the court may specify."

Sec. 4767. "*Resubmission of Case.* If the court directs that the case be resubmitted or that a new information be filed, the defendant, if already in custody, must so remain unless he be admitted to bail; or if already admitted to bail or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information and unless a new indictment be filed during the same or the next term or a new information be filed within the time specified the court must make the order prescribed in the preceding section."

Sec. 4779. "*Objections, How Taken.* When the objections mentioned in section 4771 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to

the jurisdiction of the court over the subject of the indictment or information or that it does not describe a public offense, may be taken at the trial under the plea of 'not guilty' and in arrest of judgment."

Sec. 4941. "*Motion in Arrest of Judgment.* A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment or information mentioned in section 4771, unless the objection has been waived by a failure to demur, and must be made before or at the time defendant is called for judgment."

Sec. 4942. "*Court May Arrest on Its Own Motion—No Bar.* The court may also, on its own view of any of these defects, arrest the judgment without motion. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment or information was filed, and in no case of arrest of judgment is the verdict a bar to another prosecution."

Sec. 4943. "*Defendant Guilty but Pleading Insufficient.* If from the evidence on the trial there is reasonable ground to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county or admitted to bail anew to answer the new indictment or information. If the evidence shows him guilty of another offense, he must be committed or held thereon, but if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged, or if admitted to bail, his bail must be exonerated, or if money has been deposited instead of bail, it must be refunded to the defendant, and in such case an arrest of judgment operates as an acquittal of the charge upon which the indictment or information was founded."

Section 4813, Revised Code of South Dakota.

Section 4813. "*Change of Judge and Place of Trial.* A criminal action prosecuted by indictment or information may, at any time before the trial is begun, on the application of the defendant, be removed from the county in which it is pending, whether the offense charged be a felony or misdemeanor, whenever it shall appear to the satisfaction of the court, by affidavits or other evidence, that a fair and impartial trial cannot be had in such county; in which case the court may order the defendant to be tried in some near or adjoining county, in any circuit where a fair and impartial trial can be had; but the defendant shall be entitled to a removal of the action but once, and no more; and if he shall make affidavit that he cannot have an impartial trial by reason of the bias or prejudice of the presiding judge of the circuit court where the indictment or information is pending, the Judge of such court must call some other judge of the circuit court to preside at said trial. And it shall be the duty of such other judge to preside at said trial and do any other act with reference thereto as though he were presiding judge of said circuit court."

Section 6, Art. 6, Constitution of South Dakota.

"The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy, but the legislature may provide for a jury of less than twelve in any court, not a court of record and for the decision of civil cases by three-fourths of the jury in any court."

Section 7, Art. 7, Constitution of South Dakota.

"In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial

jury of the county or district in which the offense is alleged to have been committed."

Sec. 4410, Revised Code of South Dakota.

Sec. 4410. "*In a criminal action the defendant is entitled:*

1. To defend in person and by counsel;
2. To demand the nature and cause of the accusation against him and to have a copy thereof;
3. To meet the witnesses against him face to face;
4. To have compulsory process served for obtaining witnesses on his behalf; and,
5. To a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, or the county to which such county is attached for judicial purposes."

#### AFFIDAVIT FILED IN SUPPORT OF MOTIONS TO SUBSTITUTE AND TO INTERVENE

STATE OF SOUTH DAKOTA, }  
County of Hughes. } SS.

Byron S. Payne, being first duly sworn, upon his oath states that he is an attorney-at-law residing at Pierre, South Dakota, and duly admitted to practice in the Courts of the State of South Dakota, and in the United States District Court for the District of South Dakota, and in the Supreme Court of the United States. That he is one of the attorneys of record for the appellant in this case.

That this case is a proceeding in habeas corpus brought by the appellant, George W. Egan, against the appellant, Vincent L. Knewell, in his official capacity as Sheriff of Minnehaha County, South Dakota. That the appellant, George W. Egan, was on or about April 17, 1922 convicted in the Circuit Court in and for Minnehaha County, South Dakota, of a criminal offense, and was by the judgment of said

Court on or about said date sentenced to imprisonment in the penitentiary of the State of South Dakota for a period of two years. That said Circuit Court of said County is one of the Courts of general jurisdiction of said state. That on or about December 1, 1923, process from said Court was placed in the hands of the appellant in his capacity as Sheriff of said Minnehaha County, for the execution of said judgment, and for the placing of the said appellee, Egan, in the said South Dakota Penitentiary. That on or about said date said appellant, Knewell, took the appellee, Egan, into his custody by virtue of said process of said Court to execute said judgment. That thereupon the appellee, Egan, filed his petition for a writ of habeas corpus with the District Court of the United States for the District of South Dakota. That upon the hearing upon the said writ, the appellant, Knewell, appeared by Hugh Gamble, who was then an attorney-at-law and the regularly elected, qualified and acting States Attorney in and for Minnehaha County, South Dakota. That at the hearing on said writ, the Hon. Buell F. Jones, Attorney General of the State of South Dakota, also appeared in his official capacity as such officer in opposition to the discharge of the appellee under said writ and appears of record as one of the attorneys for the appellant, Knewell, in the District Court. That affiant also appeared in said proceeding in opposition to the granting of the discharge of the appellee, Egan, from the custody of the said Sheriff, being employed by the Attorney General in behalf of the State of South Dakota, and representing the State of South Dakota in such proceeding. That the entire expense in said proceeding of defending the appellant, Knewell, and the custody which Knewell had of the said Egan was paid by the State of South Dakota.

The above described District Court having on or about April 2, 1924 entered its Order and Decision to the effect that the petitioner, Egan, be discharged from the custody of the said Knewell, as Sheriff of

Minnehaha County, South Dakota, an appeal was taken in the name of said Knewell to the Supreme Court of the United States. That said appeal was taken by Buell F. Jones, Attorney General of South Dakota, by Hugh Gamble as States Attorney of Minnehaha County, South Dakota, and by affiant employed by and representing the State of South Dakota, all acting as counsel in said matter. That the State of South Dakota has paid the entire expense of prosecuting this appeal, and all costs thereof, including the cost of printing the record and for Clerk's fees. That the said appellant, Vincent L. Knewell, at no time has been represented by his own personal or private counsel nor has he paid any of the expenses of such appeal. That affiant has caused his appearance to be entered of record in said cause for said appellant, but same was entered in behalf of the State of South Dakota, at the request and under the employment of the Attorney General of said State, and for the purpose of protecting the interests of the State of South Dakota, in said proceeding. That Section 5364 of the South Dakota Revised Code of 1919 provides among other things that the Attorney General "whenever in his judgment the welfare of the state demands, shall appear for the State and prosecute or defend, in any Court or before any officer, any cause or matter, civil or criminal, in which the State may be a party or interested." That the Attorney General of South Dakota has deemed that the welfare of the State of South Dakota demands that he appear in the instant case, and the Attorney General did appear in this cause, while pending before the United States District Court. That the Attorney General has not personally entered his appearance in the United States Supreme Court because of the fact that he has not yet been admitted to practice in said Court, but he authorized affiant in behalf of the State of South Dakota and representing the Attorney General to enter said appearance of record in behalf of the appellant, and to protect and defend the rights and

interests of the State of South Dakota in said appeal.

That said Vincent L. Knewell is no longer Sheriff of Minnehaha County, South Dakota, his term of office having expired on January 6th, 1925. That he was then succeeded by George Boardman as Sheriff of Minnehaha County, South Dakota, who on said date, having been duly elected to said office, qualified and assumed the duties of said office. That on January 6, 1925, when the said Knewell was succeeded by the said Boardman, the process for the execution of the judgment rendered against the said Egan hereinbefore described was in the hands of the said Knewell, the said judgment never having been executed because of the Order of the United States District Court above described for the discharge of the said Egan. That Section 7038 of the South Dakota Revised Code, 1919, provides as follows:

"Every public officer elected or appointed under the laws of this state, on going out of office at the expiration of his term thereof, shall forthwith deliver to his successor in office all public money, books, records, accounts, papers, documents and property in his possession or under his control belonging or appertaining to such office."

That the process by which the said Knewell was holding the said Egan in custody at the time the writ of habeas was issued out of the said United States District Court has now been delivered to the said George Boardman as successor in office to the said Knewell, and it is now the duty of the said Boardman to execute said judgment except as restrained by the judgment of the United States District Court discharging the said Egan as above set forth.

That Samuel Herrick, attorney-at-law, of Washington, D. C., is authorized by the Attorney General of South Dakota to represent the State of South Dakota in this matter, the said appellant, Knewell, and his successor in office, the said George Boardman,

and to enter his appearance of record in behalf of each and every one of the above.

This affidavit and verified statement is made in behalf of the State of South Dakota to show its interest therein and in behalf of the said George Boardman for whom there is pending a motion to be substituted as a party to this cause, and to apprise the Court fully in the situation, with respect to said cause.

BYRON S. PAYNE

Subscribed and sworn to before me  
this 16th day of January, 1925.

Otto B. Linstad,  
Notary Public, S. D.

(Seal)

My Commission expires July 31st, 1928.

POSTPONED TO  
JAN 26 1925

22

U. S.  
FILED  
JAN 23 1925  
WM. R. STANGORRY  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1924.

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**No. 622.**

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VINCENT L. KNEWELL, AS SHERIFF OF MINNEHAHA  
COUNTY, SOUTH DAKOTA, APPELLANT.

*vs.*

GEORGE W. EGAN.

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**MOTION TO INTERVENE.**

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Comes now the State of South Dakota, by its Attorney-General and also its other attorneys, and respectfully petitions the court for leave to intervene as one of the party plaintiffs in the above case, by reason of its interest therein and its having prosecuted the case through its attorneys

continuously to the present date. And petitioners will ever pray, etc.

Respectfully submitted,

BUELL F. JONES,

*Attorney-General of South Dakota.*

BYRON S. PAYNE,

SAMUEL HERRICK,

*Attorneys for State of South Dakota.*

MEM.—In support of this motion there is filed the affidavit of Byron S. Payne, Esq., former Attorney-General of South Dakota and one of the attorneys of record for the appellant in this case. Reference is also had to *State v. Gordon*, (105 Miss., 454); *State ex rel. Keyes v. Buckham*, 29 Minn., 462; *In re Medley*, 134 U. S., 160; *In re Bonner*, 151 U. S., 242; *Colman v. Tennessee*, 97 U. S., 509; *In re Christian*, 42 Fed., 199, 204; *State v. Huegin*, 110 Wis., 189; and to the note in 19 A. L. R., 385-405.

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FILED  
APR 16 1925

W. H. S. 1925

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1924.**

**No. 622**

**VINCENT L. KNEWELL, AS SHERIFF OF MINNEHAHA  
COUNTY, SOUTH DAKOTA, APPELLANT,**

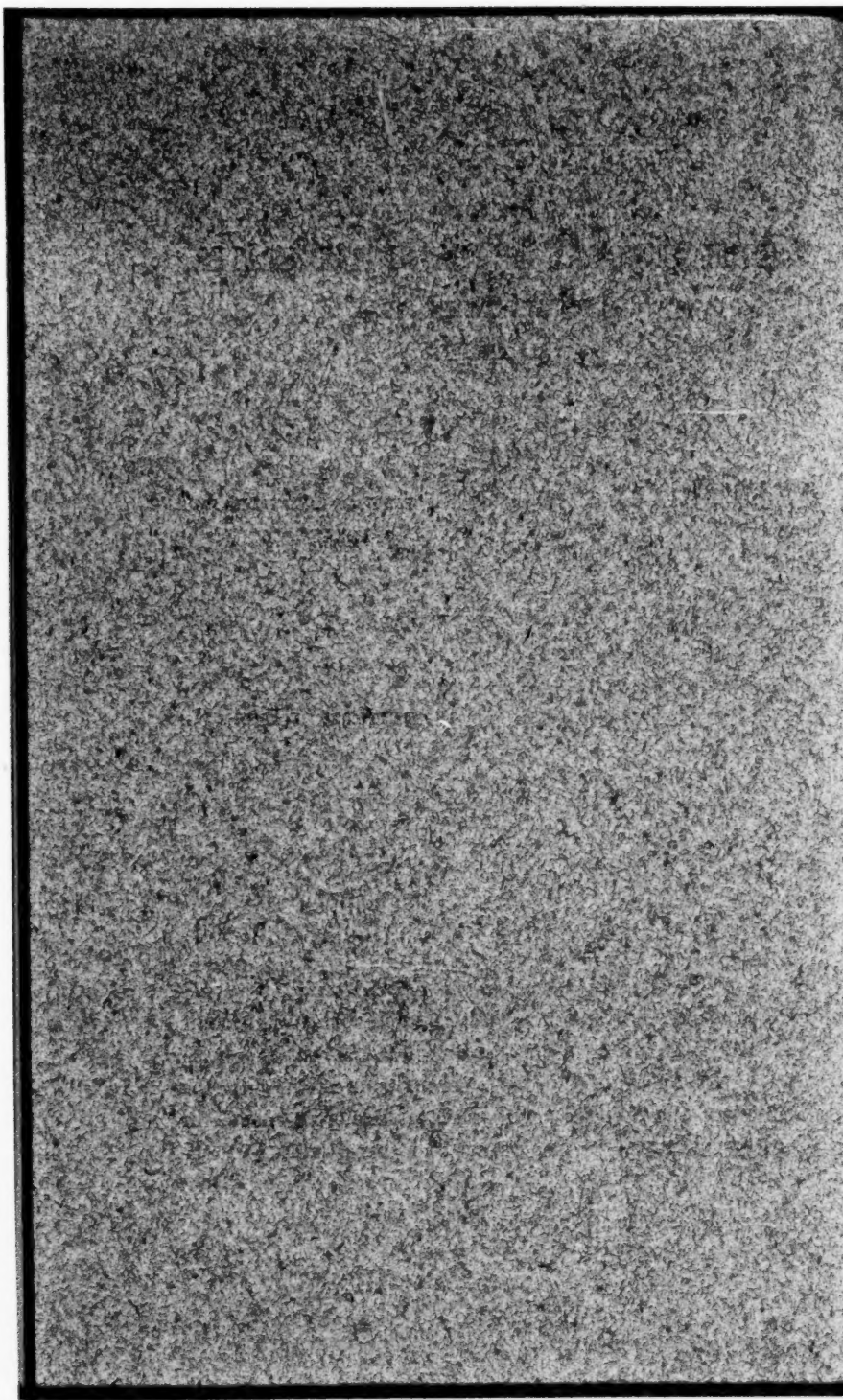
**vs.**

**GEORGE W. EGAN.**

**THIS PAMPHLET PRESENTS**

- I. Motion to File and Adopt Assignments of Error.**
- II. Affidavits of J. D. Coon and Hugh Gamble in Opposition to Motion to Dismiss.**
- III. Consent of George Boardman as Sheriff to be Substituted as Appellant.**
- IV. Statement in Opposition to Motion to Dismiss.**

**BUELL F. JONES,**  
*Attorney General of South Dakota.*  
**BYRON S. PAYNE,**  
**SAMUEL HERRICK,**  
*Attorneys for Appellant, State of South  
Dakota, and for George Boardman as  
Sheriff of Minnehaha County, S. Dak.*



IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1924.

---

**No. 622**

---

VINCENT L. KNEWELL, AS SHERIFF OF MINNEHABA  
COUNTY, SOUTH DAKOTA, APPELLANT,

*vs.*

GEORGE W. EGAN.

---

**I. Motion to File and Adopt Assignments of Error.**

Come now the State of South Dakota, by its Attorney General and also its other attorneys, and also George Boardman as Sheriff of Minnehaha County, South Dakota, by his counsel, and respectfully petition the Court for leave to file and adopt the Assignments of Error made a part of the record on the part of Vincent L. Knewell as Sheriff of Minnehaha County, South Dakota, in this appeal, such Assignments of Error being found in the printed record on pages 106 to 108, inclusive, and to file and adopt such Assignments of Error as Assignments of Error for them respectively in this cause. This Motion is made in connection with the Motion of the State of South Dakota heretofore made, for leave to intervene in this cause, and this Motion is to be

considered in connection with said Motion to Intervene, and in connection with the other matters submitted in support of said Motion to Intervene. The State of South Dakota and George Boardman as Sheriff of Minnehaha County, South Dakota, hereby offer to furnish a new and further appeal bond in this cause, or to furnish such undertaking as may be prescribed by the Court to relieve the original appellant Vincent L. Knewell as Sheriff of Minnehaha County, South Dakota, from liability on his appeal bond, or to indemnify him for any liability he may be compelled to respond to by reason of such appeal bond. And petitioners will ever pray, etc.

Respectfully submitted,

BUELL F. JONES,

*Attorney General of South Dakota.*

BYRON S. PAYNE,

SAMUEL HERRICK,

*Attorneys for State of South Dakota, and*

*for George Boardman as Sheriff of*

*Minnehaha County, S. Dak.*

## **II. Affidavit of J. D. Coon.**

J. D. Coon, being first duly sworn, on oath deposes and says, that he is a resident of Sioux Falls, South Dakota; that he is the State's Attorney of Minnehaha County, South Dakota; that he took office as such State's Attorney on the 6th day of January, 1925; that he received from Byron S. Payne, Attorney at Law, of Pierre, South Dakota, a letter under date of January 6, 1925, in which was enclosed the original letter from the Clerk of the Supreme Court of the United States written to Byron S. Payne, Pierre, South

Dakota, on January 2, 1925; that in this letter from the Clerk of the Supreme Court there were recited the facts about the receiving from Mr. Knewell of a Motion to Dismiss the Appeal in the case of *Knewell vs. Egan*, No. 622, of the October Term, 1924.

That on the 16th day of January, 1925, at 3 o'clock p. m., at the request of the affiant, Mr. Vincent L. Knewell called at the office of Coon & Coon, in the Union Savings Building, Sioux Falls, South Dakota; that in the presence of J. M. Coon, brother and partner of affiant, affiant talked with Mr. Knewell, about the case in which he is a party, as Sheriff of Minnehaha County, South Dakota; affiant presented Mr. Knewell with the letter from the Clerk of the Supreme Court, above mentioned, and asked for an explanation.

Affiant further states that Mr. Vincent Knewell stated in response to affiant's inquiry, that he, Vincent L. Knewell, did sign a Motion to Dismiss the appeal of the case of *Vincent L. Knewell vs. Egan*. Mr. Knewell stated that while the Salinger case was being tried in Sioux Falls, South Dakota, in the Federal Court, which was during the month of November, that Ben Salinger, Sr., and George Egan talked to him (Knewell), and told him he would be liable for the costs in the above named case in the event that Mr. Egan should win and that Mr. Salinger prepared the Motion to Dismiss and Mr. Knewell signed it and that Mr. Salinger told Knewell that he was going to Washington immediately after the trial of the case of Ben Salinger, Jr., and that he would take the Motion to Dismiss and personally present it to the Clerk of the Supreme Court, and so far as he knows that was done by Ben Salinger, Sr.

Affiant further states that Mr. Knewell told him that he was informed by another attorney in the City of Sioux Falls that he would be liable for costs in the event that the suit should be decided in favor of Mr. Egan.

J. D. COON.

Subscribed and sworn to before me this 24th day of January, 1925.

[SEAL.]

E. L. CAILLE,  
*Notary Public Minnehaha County,*  
*South Dakota.*

## **II. Affidavit of Hugh S. Gamble.**

Hugh S. Gamble, being duly sworn, deposes and says, that he was the State's Attorney of Minnehaha County, South Dakota, from the 2d day of January, 1923, until the 6th day of January, 1925; that deponent received a telegram from Vincent L. Knewell, who was at that time Sheriff of Minnehaha County, South Dakota, from the City of Minneapolis, and State of Minnesota, where he was in company with the Appellee before the Hon. Wilbur F. Booth, Judge of the District Court of Minnesota, acting for and instead of the Hon. James D. Elliot, Judge of the District Court for the District of South Dakota; that he, deponent, did not appear in said action, except for a request for a continuance in the matter of making Sheriff's Return and that all appearances of counsel for Appellee were made by the Hon. Buell F. Jones, Attorney General of the State of South Dakota, and that deponent acted only in said matter as State's Attorney of Minnehaha County, South Dakota.

(Signed) HUGH S. GAMBLE.

Subscribed and sworn to before me this 4th day of April, 1925.

GEORGE E. JOHNSTON,  
*Notary Public, South Dakota.*

**III. Consent of George Boardman as Sheriff to be Substituted as Appellant.**

The undersigned, George Boardman, being the duly elected, qualified and acting Sheriff of Minnehaha County, South Dakota, hereby states to the Court that he assumed such office on January 6, 1925, and has at all times since such date been the incumbent of said office. That he hereby consents to be substituted in the place of his predecessor, Vincent L. Knewell, as Appellant, and as a party to the above entitled action, hereby ratifies and approves all that counsel for Appellant has heretofore done with respect to securing his substitution for the said Knewell as a party to said action.

Dated March 20th, 1925.

GEORGE BOARDMAN.

STATE OF SOUTH DAKOTA,  
*County of Minnehaha, ss:*

George Boardman, being first duly sworn, upon oath states that he is the person who signed the within and foregoing paper, and that he knows the contents thereof, and the same is in all respects true.

GEORGE BOARDMAN.

Subscribed and sworn to before me this 20th day of March, 1925.

[SEAL.]

J. D. COON,  
*Notary Public, S. Dak.*

#### IV. Statement in Opposition to Motion to Dismiss.

For our position with reference to motion to dismiss, see our argument and authorities in the main brief under the heading of discussion of Motions to Substitute and to Intervene. We there contended that the only necessary party before the Court in a *habeas corpus* matter is the petitioner, the legality of whose detention is involved; that it is not a suit between him and the officer who happens to have him in charge; that when the writ issues, the Court becomes responsible for the custody of the petitioner and must dispose of him as law and justice require. We further showed that the appeal was regularly taken to this Court, and this Court now has full jurisdiction of the cause for all purposes; that under the law the duty has now devolved upon this Court to dispose of the party as law and justice require.

We call to the attention of the Court that the writ of *habeas corpus* was directed to the officer Knewell in his official capacity as Sheriff of Minnehaha County, South Dakota; that he made return to the writ as such officer, and took his appeal to this Court as such officer. The Attorney General and State's Attorney of Minnehaha County appeared for him in such official capacity in the District Court, and appear for him here as such official. This is their right and duty under the law. See Sec. 5364, South Dakota Revised Code, Main Brief, page 67. They did not assume to represent him in his private or individual capacity either in the district court or here. So far as he is involved here as an official of the State is concerned, they claim the right to represent him, protect the State's interest, and control this litigation to that end. *State ex rel. v. Huegin*, 110 Wis., 189.

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We are here offering to fully relieve Knewell as an individual from any burden or liability, by furnishing new appeal bond or indemnity. This the Court may properly grant. *Jerome v. McCarter*, 21 Wall., 31; *Brown v. McConnell*, 124 U. S., 492; *Draper v. Davis*, 102 U. S., 370. We are further offering to have the State of South Dakota, which is the real party in interest, and the official who has succeeded Knewell, step in and fully assume the burden and the liabilities of this litigation. Knewell is no longer in office, and should not assume to control this litigation. Permit him to be fully relieved and protected, and go hence. And all this is proposed and done that this Court may properly pursue the inquiry enjoined upon it by law, and dispose of the party before it as law and justice require.

Respectfully submitted,

BUELL F. JONES,

*Attorney General of South Dakota.*

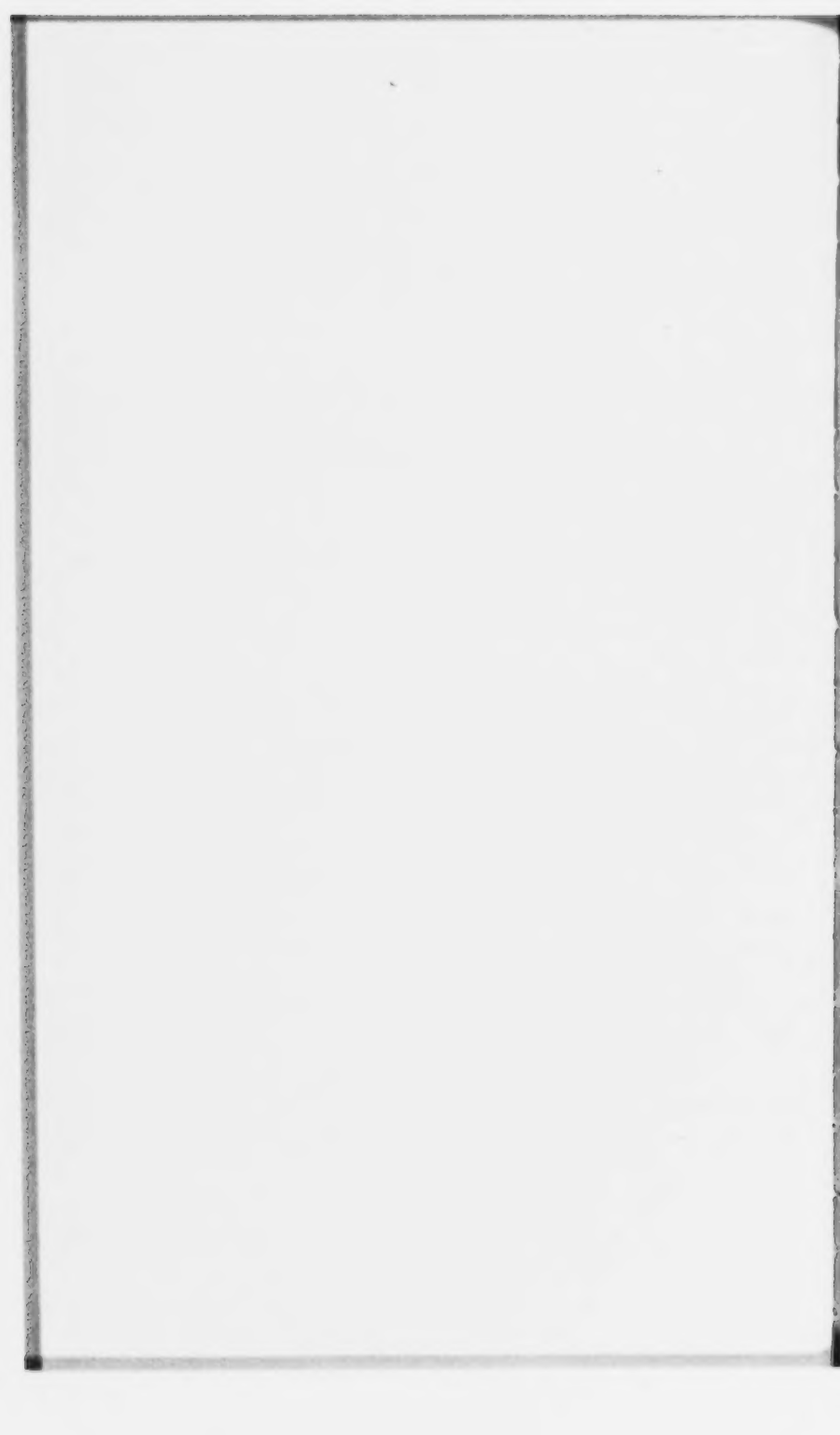
BYRON S. PAYNE,

SAMUEL HERRICK,

*Attorneys for Appellant, State of South*

*Dakota, and for George Boardman as*

*Sheriff of Minnehaha County, S. Dak.*



APR 18 1924

W. M. B. S. S. S. S.

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1924.**

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**No. 622.**

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VINCENT L. KNEWEL, AS SHERIFF OF MINNEHAHA  
COUNTY, SOUTH DAKOTA, APPELLANT,

*vs.*

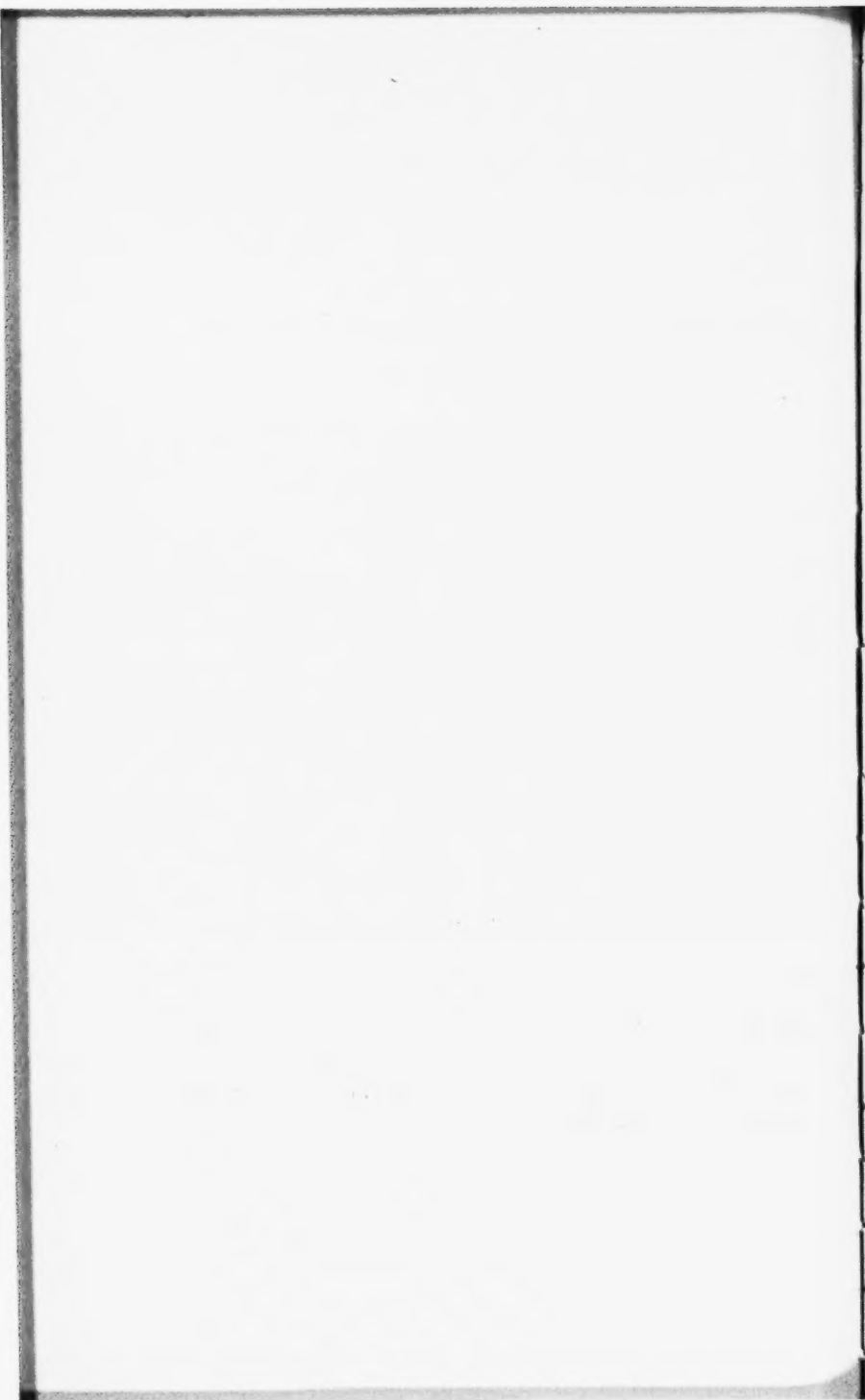
GEORGE W. EGAN.

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**MOTION BY APPELLANT TO DISMISS APPEAL AND  
TO STRIKE APPELLANT'S BRIEF.**

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JOE KIRBY,  
*Counsel for Appellant.*



IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1924.

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CASE No. 622.

---

VINCENT L. KNEWEL, APPELLANT,

*vs.*

GEO. W. EGAN, APPELLEE.

---

**Motion by Appellant, Vincent L. Knewel.**

Comes now Vincent L. Knewel and by his attorneys respectfully moves this Court:

1. To strike from the record the purported brief and argument filed on his behalf in this Court by B. S. Payne and B. F. Jones, and others, purporting to represent him in this case, for the reason that he never authorized the preparation or the presentation of any brief in this proceeding; that he never authorized any attorneys to appear in this Court for him as appellant.

2. To dismiss this appeal in accordance with his original motion, which he served on appellee December 15, 1924, and sent with a personal letter to the Clerk of this Court on December 31, 1924. Reference had to appellant's affidavit attached hereto and made a part hereof.

JOE KIRBY,  
*Attorney for Appellant.*

IN THE  
SUPREME COURT OF THE UNITED STATES.

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**CASE No. 622.**

---

VINCENT L. KNEWEL, *Appellant*,

*vs.*

GEO. W. EGAN, *Appellee*.

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**Affidavit of Vincent L. Knewel.**

STATE OF SOUTH DAKOTA,  
*County of Minnehaha, ss:*

Vincent L. Knewel, first being duly sworn, states that he is the appellant in the case entitled in this Court Vincent L. Knewel, appellant, *vs.* Geo. W. Egan, appellee; that he never authorized any attorneys to prepare or file any brief for him; that he never authorized either B. S. Payne, attorney, or B. F. Jones, or any other of the attorneys who up to this time claim to appear for him in this Court; that this appellant desires to have this case dismissed and has acted accordingly, and does not feel that he is further bound for any action in connection herewith.

VINCENT L. KNEWEL,  
*Affiant.*

Subscribed and sworn to before me this 8th day of April,  
1925.

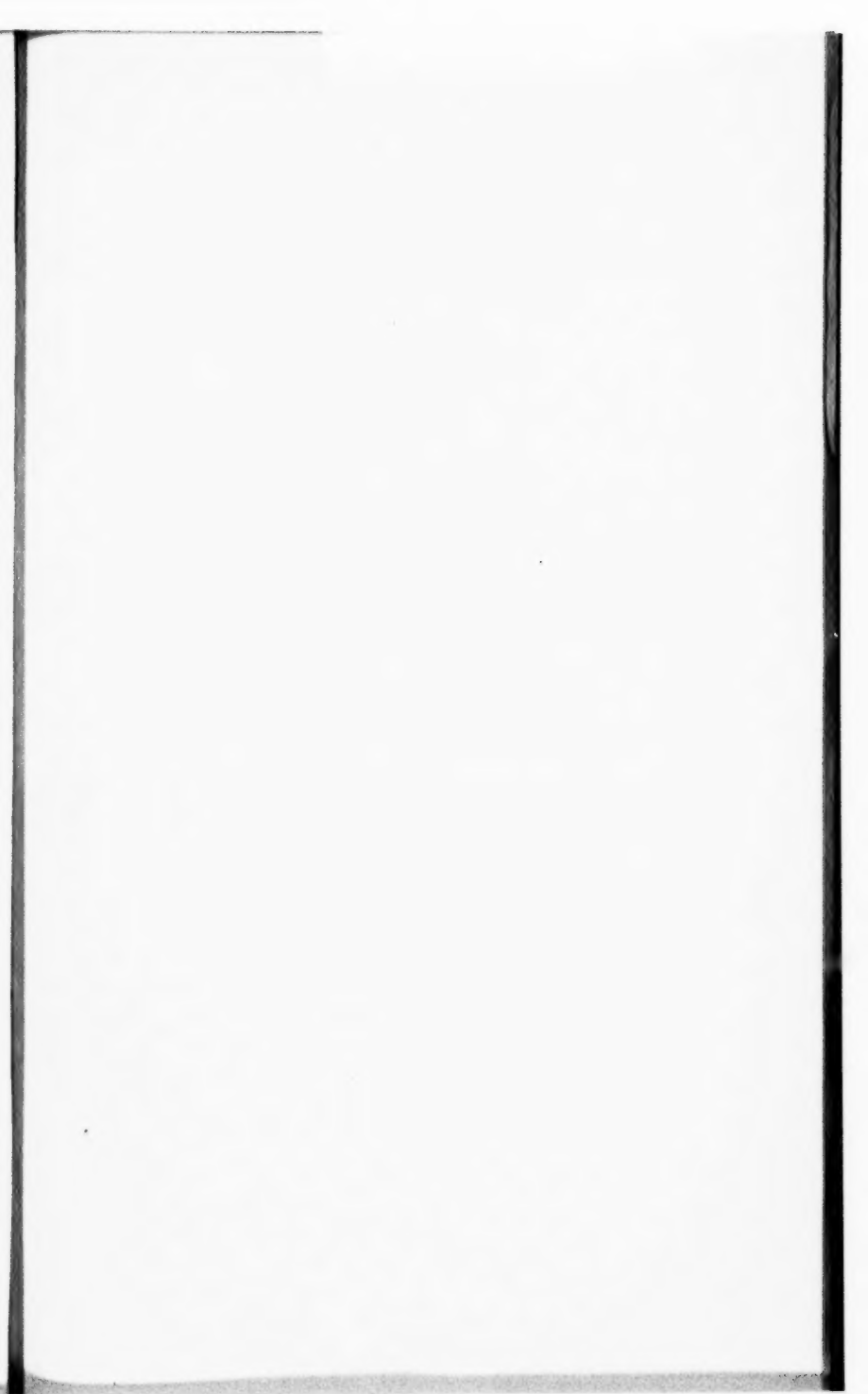
[SEAL.]

JOE KIRBY,  
*Notary Public.*

Endorsed: File No. 30,587. Supreme Court U. S. October Term, 1924. Term No. 622. Vincent L. Knewel, as Sheriff, etc., Appellant, vs. George W. Egan, Motion by Appellant to Dismiss Appeal and to Strike Appellant's Brief. Filed April 13, 1925.

(6135)

*end*





IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWEL,  
as Sheriff of Minnehaha County, South Dakota,  
APPELLANT,

vs.

GEORGE W. EGAN,  
APPELLEE.

APPEAL FROM ORDER AND JUDGMENT OF THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF SOUTH DAKOTA,  
SITTING IN THE SOUTHERN DIVISION OF SAID  
DISTRICT.

HON. ALBERT L. REEVES, Presiding.

IN THIS BOOKLET APPELLEE PRESENTS:—

- I. HIS MOTION TO DISMISS APPEAL.
- II. HIS OPPOSITION TO THE MOTION TO INTERVENE.
- III. HIS OPPOSITION TO THE MOTION TO SUBSTITUTE.
- IV. HIS BRIEF ON THE MERITS OF THE MAIN CASE.
- V. THE OPINION AND JUDGMENT OF TRIAL COURT.

GEO. W. EGAN, Appellee, Pro Se Se.



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## STATEMENT.

Appellee has sought to follow strictly the rules of this Court in the preparation and presentation of his Brief and Arguments.

1. Perhaps it might be urged that there should have been a division of the subject matter contained in this booklet and that the Motion of Appellee and his Opposition to the *Motion to Intervene* and the *Motion to Substitute* should have appeared in a separately printed document.

2. It has occurred, however, to Appellee that by condensing and compiling these matters into this one booklet it would be much to the convenience of Court and counsel.

3. Appellee desires to have first considered by the Court the Motion of Vincent L. Knewel to dismiss this case; which Motion was served on Appellee on the 15th day of December, 1924, and lodged with the Clerk of this Court for filing on December 31st, 1924.

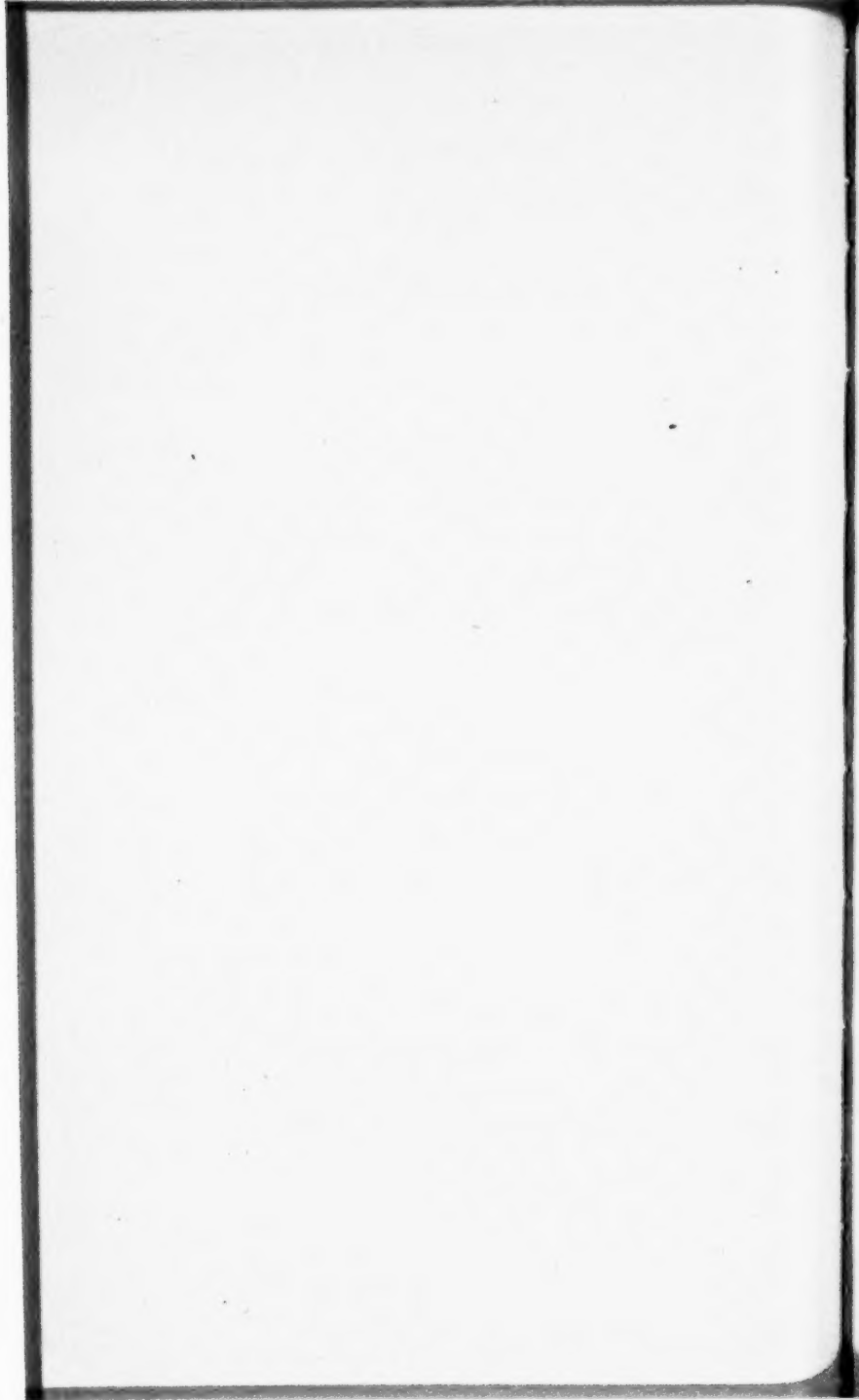
4. It appears that this Court's attention was never called by its Clerk to this Motion of Appellant Knewel. Therefore, to bring Knewel's Motion before the Court, Appellee has addressed his Motion to this Court, hoping to accomplish that end.

5. Following Appellee's Motion just referred to are his reasons for opposing the *Motion to Intervene* and the *Motion to Substitute*, with his citation of authorities on these questions; the affidavit of Vincent L. Knewel is set forth showing some facts relied on.

6. Then follows in regular order the statement of the original case that was tried before Judge Albert L. Reeves, of Kansas City, in the United States District Court, and the brief and argument supporting Appellee's contention that if the case is not dismissed by this Court on the Appellant's Motion that the decision of Judge Albert L. Reeves in the District Court of the United States should be by this Court affirmed, and this appeal dismissed.

Respectfully submitted,

GEO. W. EGAN, *Pro Se Se.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1924.

---

No. 622

---

VINCENT L. KNEWEL,  
As Sheriff of Minnehaha County, South Dakota,  
*Appellant,*

vs.

GEORGE W. EGAN,  
*Appellee.*

---

APPEAL MUST BE DISMISSED.

The Court will not have proceeded far in the consideration of the case at bar before it shall realize that this appeal must be dismissed.

Knewel was the only appellant. Knewel quit. He paid the cost taxed against him in the United States District Court and on December 15th, 1924, prepared, served and forwarded to the Clerk of this Court his written Motion asking that this case be dismissed.

Those opposing the appellee recognize that Knewel is through, that he will proceed no further and that he cannot be compelled to assume any further responsibility in connection with this appeal in the present condition of the Record, and that his personal bond cannot be held further.

Therefore, they seek to substitute a new party for Knewel and they also ask that the State of South Dakota be permitted to intervene. This cannot be granted.

*Collins v. Miller*, 252 U. S. 364 l. c. 368.

*State v. Kelsey*, 231 Pac. 122.

*Baird, Sheriff v. Nagel*, 142 N. E. 9 l. c. 11.

Therefore appellee presents first in this booklet his

Motion to bring on before the Court, Knewel's Motion to Dismiss.

Appellee next calls the Court's attention to his Opposition to the purported Motions to Intervene and to Substitute.

### NO BRIEF SERVED.

Up to the time of the writing of this brief, March 30th, 1925, those opposing appellee have served no brief or argument and it is necessary for the writer to anticipate rather than to answer definitely and specifically.

Not having received a copy of the brief and argument of those opposing appellee he cannot say what kind of a statement they have made. Therefore, appellee deems it necessary to make a definite and specific statement of the issues in the main case from the record for the convenience of the Court.

---

### I. HIS MOTION TO DISMISS APPEAL.

Comes now GEO. W. EGAN, Appellee in this Court, and respectfully moves:

1. That this Court make an order requiring Clerk of the Court to call to this Court's attention a Motion to Dismiss made by Appellant VINCENT L. KNEWEL, and served upon Appellee GEO. W. EGAN, on December 15th, 1924, and lodged with the Clerk of this Court for filing on the 31st day of December, 1924, which Motion to Dismiss Appeal is in words and figures as follows, to-wit:

#### OMITTING CAPTION:

"Comes now the respondent herein (appellant in this Court) and shows unto this Court that the said District Court, sitting as aforesaid, did on the first day of April, 1924, make and cause to be entered in the above entitled case, its judgment and order sustaining the petition in habeas corpus filed by said George W. Egan, the petitioner and plaintiff (now appellee), in the above entitled case.

"Appellant shows further that on the 12th day of May, 1924, he duly perfected an appeal to this Court, and in connection therewith made and delivered his bond condi-

tioned to pay all costs that might be adjudged herein, or on this appeal.

"This appellant being unwilling to bear further the burden of this appeal, and desiring to be relieved from the payment of costs made later than this date, and for which judgment in this appeal might be entered herein, now respectfully moves this Court that his said appeal in the above entitled cause be by this Court dismissed."

VINCENT L. KNEWEL,  
Sheriff of Minnehaha County,  
South Dakota,  
(Now Appellant)

"I, George W. Egan, Petitioner and Plaintiff, (now Appellee, hereby admit that service of the above and foregoing Motion was duly and properly made upon me the 15th day of December, 1924."

GEO. W. EGAN,  
(Now Appellee)

For the following good and sufficient reasons, to-wit:

(a) Vincent L. Knewel was and is the only person entitled to appeal in behalf of the appellant in this case.

(b) It is a well settled rule of law that only the party or parties to the suit may appeal from final judgment; a third party cannot take an appeal in the name of a party to the decision merely because it may affect his interests adversely. *Baird, sheriff v. Nagel* 142 N. E. Page 9.

(c) This Court settled for once and for all that no other person than the party against whom the writ runs may appeal from an adverse decision in a habeas corpus proceeding. This was definitely decided in *Collins v. Miller* 252 U. S. 364 at Page 368, concluding paragraph.

2. It being the settled law that in the case at bar Knewel alone may appeal it must follow, as the night the day, that Knewel alone controls the destiny of the case from the viewpoint of the appellant. He, only, having the right to appeal, he, alone, has the right to have this case dismissed on his Motion. Having prepared and served his Motion to Dismiss this case he is entitled to have an order of this Court based on said Motion of Dismissal.

3. That the attorneys claiming to represent Appellant

Knewel do not represent him, never were instructed to appeal and were at no time appearing for Appellant Knewel in this appeal with his knowledge or consent (see affidavit of Knewel made part of this Motion and herein set out); that each party to a suit has a right to select his own attorney and no attorney may appear for him or act for him without his knowledge or consent. See *Baird, Sheriff v. Nagel*, 142 N. E. Page 9, at Page 11.

Wherefore, Appellee prays that his Motion be sustained, and that this appeal be dismissed.

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State of South Dakota, County of Minnehaha, ss.

### AFFIDAVIT OF VINCENT L. KNEWEL

VINCENT L. KNEWEL, first being duly and solemnly sworn on his oath, states: That he is the same Vincent L. Knewel who appears as appellant in KNEWEL VS. EGAN now pending in the Supreme Court of the United States; that when the writ in the habeas corpus was served on him on December 1st, 1924, that on the 3rd of December following he communicated with Hugh S. Gamble, States Attorney of Minnehaha County, and asked Mr. Gamble to represent him in the habeas corpus hearing; that he never at any time employed or engaged any other attorney than said Hugh S. Gamble; that B. L. Jones and B. S. Payne, of the Attorney-General's office came into the case without affiant's knowledge or consent; that they took charge of the case for affiant without any request on affiant's part and practically crowded affiant's attorney out of the case; that affiant did not want to appeal this case after he had read the opinion of Judge Albert L. Reeves of Kansas City. The opinion seemed right to affiant, but B. F. Jones and B. S. Payne told affiant that they were going to appeal and could appeal without him, and because of that they induced appellant to appeal the case; that later affiant took counsel with the most competent lawyers he could get and was advised by them that Judge Reeves had stated the law. Affiant then thought that any appeal would only be to harass and persecute Egan and he did not want to be a party to any such proceeding because he knew that B. F. Jones and B. S. Payne were personally unfriendly to Egan. That as soon as affiant received a statement from the Clerk of the United

States Court as to the amount of costs due to Egan as a result of the trial before Judge Reeves affiant paid the costs to Egan. Affiant had his attorneys prepare a motion for him to dismiss this case in the United States Court. He served the motion on Egan and then sent the motion with a personal letter to the Clerk of the United States Court at Washington, asking him to file the same and call the Court's attention to the motion. Affiant still wants this case dismissed. There are no lawyers appearing for appellant in the Supreme Court with his consent or at his request. Affiant has learned by hearsay that B. F. Jones and B. S. Payne, or somebody acting for them, have filed a motion to substitute George Boardman as appellant instead of this affiant. Affiant has received no notice of any such motion and knows nothing about it, is not a party to it and does not authorize it. Affiant has also learned by hearsay that the same parties have filed a motion for the State of South Dakota to intervene in this case, but affiant has received no notice of any such proceeding and knows nothing about it, does not consent to it and specifically objects and opposes the substitution of George Boardman or the intervention of the State of South Dakota, and requests that this case be dismissed on his motion.

VINCENT L. KNEWEL.

Subscribed and sworn to before me this 10th day of March, 1925.

(SEAL)

N. O. MONSERUD,  
Notary Public.

## II. HIS OPPOSITION TO MOTION TO INTERVENE.

George W. Egan, Appellee herein, opposes the Motion to Intervene by the State of South Dakota filed in this case on January 23rd, 1925, for the following good and sufficient reasons:

1. It is a well settled rule of law that no party may intervene in a suit or case after final judgment. This case was tried in the United States Court before Judge Albert L. Reeves, as a case entitled, Egan, Petitioner, vs. Knewel, Respondent. No other parties were known to the case at the time of its trial.

2. The record shows that Knewel was the only Appellant in this case; that the attorneys who claim to represent Boardman and the State of South Dakota in the Motions in this case appeared for Knewel before the Trial Court and signed themselves as his attorneys, see Record p. 109, 117, 120; that said attorneys made no effort to intervene in behalf of the state of South Dakota or to suggest any substitution in the trial of this case; that on appeal being taken by Appellant Knewel he furnished his personal bond conditioned on the payment of \$1000.00; that no new bond can be given; that Knewel alone can be held for costs; that no new bond can legally be substituted; that this is a civil suit and that the County or State cannot be held for costs. See *Faulke v. Board* 48 Pacific Reporter Page 153—"If it was a civil case of course the costs are not payable by the County." *The Commissioners v. Wilson* 34 Pacific Reporter 625; *Boykin v. People* 46 Pacific Reporter 635.

3. To permit the State of South Dakota, or any other person, to intervene in this case in this Court would be to change entirely the nature of the proceedings and the case would stand not as between Knewel and Egan, or Egan and Knewel, but between Egan and Knewel and the State of South Dakota, or whomever might be permitted to intervene as a party. Appellee is entitled to have this case heard by this Court in the same form or manner as it was heard in the Trial Court. This is a matter of justice not only to Appellee Egan but the Trial Court. The Trial Court was the one, if anyone, to pass on the right of any intervention in this case.

4. The State of South Dakota *did not ask to intervene* in this case at its trial and *was not* represented. Proof conclusive of that fact is that they *are here now* trying to intervene. To allow the State of South Dakota to intervene would be to say that the State of South Dakota *had a right to appeal* in this particular case between these particular parties. Such would be a direct contravention of the law as laid down by this Court and many inferior Courts in the land. *Collins v. Miller*, 252 U. S. Page 364 at Page 368; *Baird, Sheriff v. Nagel*, 142 N. E. page 9; *Faulke v. Board*, 48 Pacific Reporter page 153; *Commissioners v. Wilson*, 34 Pacific Reporter page 265; *Boykin v. People*, 46 Pacific Reporter page 635.

"There is no authority for an appeal by persons not parties to the judgment or decree. The state, like an individual person, has the right to appeal from a judgment in a civil action, but it cannot appeal when it is not a party. *Georgia v. Jesup*, 106 U. S. 458, 1 S. Ct. 363, 27 L. Ed. 216; *South Carolina v. Wesley*, 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254; *Fry v. Britton*, 2 Heisk. (49 Tenn.) 606. Habeas corpus proceedings are civil and not criminal, and belong to what, under the Code, are termed "special proceedings". In such proceedings the applicant is the plaintiff, and the party who restrains the applicant is defendant. *Winnovich v. Emery*, 33 Utah, 344, 93 P. 988."

5. That the attorneys claiming to represent Appellant in this Court do not represent him, and are acting without authority. See affidavit of Appellant Knewel herein; that the attorneys claiming to represent the proposed Intervenor and the proposed Substituted party claim also to represent Appellant; while in truth and in fact these attorneys do not represent Appellant Knewel, or George Boardman, and have not been employed by either of them, nor have they been instructed to proceed in this case, *nor has any notice* of the proposed Intervention been served either on Knewel or Boardman, *or any person for them*. Each party in Court has a right to be represented by attorneys of his own choosing. *Baird, Sheriff v. Nagel* 142 N. E. Page 9 at Page 11. See *State v. Kelsey*, Pacific Reporter 241-122.

Therefore, Appellee prays that the Motion to Intervene in behalf of the State of South Dakota may be denied.

### III. HIS OPPOSITION TO MOTION TO SUBSTITUTE.

George W. Egan, Appellee herein, opposes the Motion to Substitute George Boardman for the present Appellant, Vincent L. Knewel, filed in this case on January 14, 1925, for the following good and sufficient reasons, and for the reasons stated in opposition to the Motion to Intervene:

1. The attorneys claiming to represent Appellant Vincent L. Knewel *are not* authorized now, to appear for him, nor are they now, nor were they ever, authorized to appear for George Boardman, by him or any other person; that their appearance in this case so far as the real parties to

it are concerned is purely gratuitous and without authority. *Baird vs. Nagel*, 142 N. E., page 9, at page 11.

2. That no notice of the proposed Substitution has ever been served on Vincent L. Knewel, real appellant, or George Boardman referred to. (See affidavit of Vincent L. Knewel supporting this position.)

3. Section 2317 of the Revised Statute of the State of South Dakota referred to in the Motion to Substitute has no application herein because the Appellant is not in any wise disqualified but is in as good position to prosecute this case as he ever was if he desired to do so.

4. This case in truth and in fact does not exist so far as Appellant Knewel is concerned, for he has made and served on Appellee and lodged with the Clerk of this Court his written declaration in the form of a Motion requesting that the case be dismissed and declaring that he will not further prosecute it. (See affidavit of Vincent L. Knewel in support hereof.) *State vs. Kelsey*, Advance Sheets Pacific Reporter, Jan. 19th, 1925.

5. Because a third party cannot appeal in the name of a party to a decision merely because it affects his interests adversely, or because he may have succeeded to the position of another who has or can appeal.

6. Because "A third party cannot take an appeal in the name of a party to the decision merely because it may affect his interests adversely. *Colman v. West Va. Oil Co.*, 25 W. Va. 148; *McIntyre v. Sholty*, 139 Ill. 178, 29 N. E. 43; *Board v. Wild*, 37 Ind. App. 32, 76 N. E. 256; 142 N. E. Page 9.

In *State ex rel v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, the court, in discussing the rights of the state and of the sheriff, under a proceeding like the one in the instant case, said:

"Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be

construed as according to him the same right as to any other party to be heard by counsel."

7. There is no law applicable to the case at bar permitting substitution and the congress recognizing this fact passed an act Amending Judicial Code, which act was approved February 13th, 1925. Public Number 415-68th Congress, H. R. 8206.

Therefore, Appellee prays that the Motion to Substitute George Boardman for the present Appellant Vincent L. Knewel may be denied.

### STATEMENT OF FACTS ON MAIN CASE.

1. Defendant Egan was informed against in the Circuit Court of Minnehaha County, South Dakota, under Section 4271 of the Revised Code of 1919 of that State, which Section is in part as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss . . . is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding \$1000, or both."

2. The charge sought to be lodged against Egan was stated in the following language in the *Information*:

"And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully, and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim."

3. Egan in due course appeared in Court and entered his plea of *Not Guilty*.

4. A judge from a distant judicial circuit was called in to sit in the case. When the case was called for trial on the 3rd day of April, 1922, defendant Egan appeared in person acting as his own attorney, and made a Motion

to the Court for permission to *withdraw* his plea of *not guilty* for the purpose of interposing a *demurrer*. This Motion was denied by the Court and the case was ordered to trial. Record before this Court page 5.

5. Then before any evidence was offered or received defendant again appealed to the Court for permission to *withdraw* his plea of *not guilty* for the purpose of interposing a *demurrer*. This again was denied. See Record page 5.

6. And then defendant interposed the following specific objection of record—"Defendant objects to the introduction of any testimony under the *information* filed in this case, because,"—he then proceeded to state five specific grounds for his objection, the third and fifth of which are as follows:

"3rd,—That said *information* does not describe a public offense, that *no venue* is laid and that the Court is without jurisdiction in this case under the *information* filed herein.

"5th,—That the *County* in which the alleged offense is alleged to have been committed is not stated in said *information*, and that said *information* is defective in failing to *lay the venue* in order to give the Court *jurisdiction in the premises*."

7. The Trial Court promptly overruled defendant's objection and the trial was proceeded with.

8. At the conclusion of all the testimony on the part of the state, defendant moved for an *advised verdict* setting forth in the record specifically all the grounds mentioned, and which grounds are set forth fully in the record before this Court at Page 6. This Motion was denied.

9. At the conclusion of all the testimony, both on the part of the state and of the defendant, defendant again renewed his Motion for an *advised verdict* on all the grounds heretofore referred to, which Motion was denied.

10. Then defendant urged all these grounds in his motion in *Arrest of Judgment*, which Motion was denied.

11. Defendant then moved for a new trial, setting forth all the grounds heretofore mentioned. This Motion was denied.

12. Case went to the Supreme Court of South Dakota. Defendant urged all of his grounds before that Court, and particularly that the Trial Court was *wholly without jurisdiction*, stating specifically why. There defendant was overruled and *denied a new trial*. Defendant Egan then made a Motion for a *re-hearing*, setting forth all grounds. That, too, was denied.

13. A Mittimus was issued out of the office of the Clerk of the Circuit Court of Minnehaha County based on the judgment returned on the *information and facts as herein set out*, and defendant Egan then surrendered to the Sheriff of Minnehaha County, Vincent L. Knewel, Appellant in this Court.

14. Then defendant Egan immediately presented a Petition for a Writ of Habeas Corpus in the United States Court and secured from Judge Wilbur F. Booth, in Minneapolis, a Writ.

15. Thereafter, Judge Walter H. Sanborn, of St. Paul, assigned Judge Albert L. Reeves, of Kansas City, to hear petitioner's petition and the return thereon. At the hearing on the merits of Egan's Petition, B. F. Jones, of Pierre, South Dakota, Attorney-General, and B. S. Payne, Ex-Attorney-General, appeared and signed themselves as attorneys for Vincent L. Knewel, then respondent.

16. After a full and complete hearing Judge Albert L. Reeves rendered his decision and order on April 1st, 1924, liberating Petitioner Egan and exonerating his bond. Record page 104.

17. Thereafter and on the 12th day of May, 1924, Vincent L. Knewel, Respondent below, Appellant in this Court, perfected his appeal from the judgment and order of the District Court of the United States for the District of South Dakota, to the Supreme Court of the United States, where it now pends for disposition.

18. On December 15th, 1924, Vincent L. Knewel, Appellant, prepared and served on George W. Egan, Appellee, his Motion to dismiss the case in the United States Supreme Court.

19. Appellant, Vincent L. Knewel, then forwarded his Motion, with the acceptance of service by Egan on the same, with a personal letter to the Clerk of the Supreme

Court of the United States. Affidavit of Knewel, Appellant, at 4th page hereof.

20. Thereafter, and on the 14th day of January, 1925, there was filed with the Clerk of this Court, a purported Motion by the same attorneys who had appeared for Knewel at the hearing before Judge Reeves, asking that George Boardman be substituted for Vincent L. Knewel as Appellant.

21. Thereafter, and on the 23rd day of January, 1925, there was filed with the Clerk of this Court, by the same attorneys who had appeared for Knewel at the hearing before Judge Reeves, a purported Motion to Intervene by the State of South Dakota.

22. This is a complete statement of the case up to the present time as it appears in the record before this Court.

#### IV. HIS BRIEF ON THE MERITS OF THE CASE.

Appellee renews and specifically urges before this Court all the grounds supporting his contention for his release as set forth in his Petition for Writ of Habeas Corpus and his Amended Petition, both of which appear in full beginning on Page 1 and ending at the top of Page 16 of the printed Record before this Court.

The United States District Court did not pass on all these questions because it stated:

1. The Courts of South Dakota were *without jurisdiction* because no offense was charged in the Information against the petitioner.

2. The Courts of South Dakota were *without jurisdiction* because the complete record showed that no offense had been proven against the petitioner.

The Trial Court, having made definite and specific findings of a *lack of jurisdiction*, held that it was unnecessary to investigate and pass on any other question. This proposition is *incontrovertible*. If the Courts of South Dakota that rendered the judgment and ordered the commitment of the appellee, *were without jurisdiction* then the whole proceeding and all proceedings were a *pure nullity, Ab Initio*.

The Information filed in this case under which defen-

dant was forced to trial over his strenuous and proper objections shows on its face clearly the *lack of jurisdiction* of the Trial Court. Not only does this Information fail to charge any offense *within the jurisdiction of the Court* but a fair reading of the Information and the only reasonable interpretation of it is that if the offense sought to be charged in the Information under Section 4271 was committed at all it was committed at *Newark, New Jersey*.

The proof that no offense was established at the trial against the defendant, Egan, is shown conclusively by an examination of the record. The record discloses a total failure to prove any offense under Section 4271 because there was no evidence that any alleged false proof of loss was presented to the insurance company or its agent in Minnehaha County, South Dakota.

Those opposing the appellee here, at the trial in the United States District Court admitted that the Information did not charge an offense but stated that defendant Egan had waived his rights to insist upon the *failure of jurisdiction*.

The Trial Court held definitely against them and made a finding that instead of waiving anything the defendant Egan had in a most strenuous and proper manner objected and protested his rights. It will not be seriously contended, however, that one can waive jurisdiction. It is horn-book law that the question of jurisdiction might be raised for the first time in this, the highest Court of the land. Jurisdiction in criminal cases is established by law *and not by consent of parties*. This also, is elementary and cannot be successfully controverted.

#### LETTER NOT PRESENTED.

Those opposing appellee sought in the Trial Court, and doubtless will urge here, that they had a letter which purported to have been written by Egan to the insurance company. This letter was altogether incompetent for specific reasons urged against it at the time it was offered in the evidence. There isn't a word of testimony in the Record that this letter was written by Egan or was ever mailed or delivered by him or anybody for him, or by anybody as a matter of fact, to the insurance company or any of its agents. Officers and agents for the insurance company were on the stand at the trial and none of them

testified that they had received the same through the mail from Egan or from anybody else. The United States District Court, after going through the record, stated definitely that no offense had been proven against defendant Egan. Letter purports to have been dated Jan. 10th, 1920.

Article 6, Section 7, of the Constitution of the State of South Dakota, is as follows:

"In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to *demand the nature and cause of the accusation against him*; to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or DISTRICT in which the offense is ALLEGED to have been committed."

To "allege" means, to bring forward with positiveness; to declare; to affirm; to assert; to adduce; to advance; to assign; to produce—Webster's International Dictionary.

The Supreme Court of South Dakota in effect holds that the word "district" as used in this Section of the State Constitution means "county"—In Re: Nelson 102 N. W. 885, it is said: "Const. Art. 6 Sec. 7. This clause, or language of similar import, will be found in numerous state Constitutions. Sir William Blackstone says: 'When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the *county* must return a panel of jurors \* \* \* freeholders, without just exception, and of the *visne* or neighborhood, which is interpreted to be of the *county* where the act is committed.' 2 Cooley, Blackstone (3d Ed.) 491. The right thus guaranteed is ancient, sacred, and absolute. In its alleged infringement was declared to be one of the causes which impelled the colonies to separate from the mother country. It can neither be taken away nor abridged by the Legislature. What, then, is the nature and extent of this right; To what is one accused of crime entitled? 'A speedy public trial by an impartial jury of the *county* or *district* in which the offense is *alleged to have been committed*.' There is nothing uncertain or ambiguous in this language,

except, perhaps, the use of the word '*district*', which has uniformly been construed to mean *the trial district, or territory from which the jury is summoned.*"

This Section of the South Dakota State Constitution was construed: "All persons, when charged with crime, of whatever nature, are equally entitled to the protection of the constitution, and to invoke the safe guards those provisions have guaranteed to them for their protection. *Our conclusions are that the indictment is not sufficient and that the objections of the plaintiff in error to the admission of any evidence under it ought to have been sustained, and that the motion in arrest of judgment should have been granted. The judgment of the Circuit Court is reversed, and the Court is directed to set aside the indictment.*"—*State vs. Burchard* 57 N. W. 491 at Page 492.

Appellee was convicted under Section 4271 of the Revised Code of South Dakota, which in part is as follows: "Every person who *presents* or causes to be *presented* any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss . . . is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding \$1000. or both."

Section 4725 of the Revised Code of 1919 provides: "The indictment or information is sufficient if it can be understood therefrom." Six sub-sections are contained in this Section and Sub-section 4 is as follows: "That the offense charged was committed *WITHIN* the jurisdiction of the Court or though *WITHOUT* the jurisdiction of the Court it is triable therein."

By Section 4779 South Dakota Revised Code 1919, it is provided that objections, under said Section 4771, can only be taken by demurrer "*except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that it does not describe a public offense may be taken at the trial under the plea of not guilty and in arrest of judgment.*"

Section 4509 of the Code of South Dakota provides as follows: "When a public offense is committed partly in one county and partly in another county or the acts and effects thereof requisite to the offense occur in two or more counties the *jurisdiction is in either county.*"

Section 4510 of the Code of South Dakota provides as follows: "When a public offense is committed on the boundary of two or more counties or within five hundred yards thereof *the jurisdiction is in either county.*"

Thus it will readily appear that not only is the accused protected in his rights to be tried by a Court having competent jurisdiction with the venue clearly *alleged* and "*proven as laid in the information*", by Article 6 of Section 7 of the organic law of the state but the Legislature enacted special statutes, herein set out, making his guarantees doubly sure and the certainty of his rights doubly certain.

The only allegation in the information as to County or District or Venue is as follows:

"And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully, and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim."

Thus it has already appeared both by a positive provision of the State Constitution and under Sub-section 4 of Section 4725 of the Revised Code of 1919 that the **VENUE MUST BE ALLEGED**—"In the information or indictment in order to give the Court **JURISDICTION** of the alleged offense the law is well settled that it is absolutely necessary that the **VENUE MUST BE ALLEGED** in the information and that it cannot be **INFERRED**." Section 7 Article 6 State Constitution; Section 4725 Sub-section 4 Code of 1919; *State vs. Williams* 4 Ind. 234; *Freeman vs. State* 224 S. W. 1087; *U. S. vs. Christopher* 261 Fed. 225; *State vs. Cole, et al*, 174 Pac. 131; *People vs. Webber* 66 Pac. 38; *State vs. Mahoney* 98 Atl. 750; *State vs. Parks* 44 Cal. 105; *Howard vs. Supreme Court* 153 Pac. 7; *State vs. Beeskove* 85 Pac. 371; *State vs. McCoy* 35 N. W. 202; *Gaweka vs. State* 142 N. W. 287; *People vs. Craig* 59 Ca. 370; *People vs. Wong Wang* 28 Pac. 721; *Territory vs. Doe* 25 Pac. 472; *State vs. Knight* 43 N. E. 995; *The People ex rel Fleming Stevenson; Plaintiff in error vs. James M. Higgins, defendant*, 15 Ill. 110; *People vs. Wakao et al*, 165 Pac. 721; *Ex Parte Slater* 72 Mo. 102.

It is hornbook law and there can be found no decision to the contrary that *the venue must be proven as alleged in the information*. *Wall vs. State* 63 S. E. 27; *In re: Kelly* 46 Fed. 653; *State vs. Sexton* 124 S. W. 521; *State vs. Schneiders* 168 S. W. 604; *State vs. Wheaton* 99 Pac. 1133; *People vs. Blummenberg* 110 N. E. 790; *People vs. Parks* 44 Cal. 105; *Ex parte Slater* 72 Mo. 102.

*State vs. Wheaton* 99 Pac. 1133—"Where a person is charged with having committed the offense above referred to in a particular County and is convicted thereof in the District Court of such County but no evidence is produced to establish where the crime was committed the conviction cannot stand."

In *People vs. Blummenberg* 110 N. E. 790 the Court holds: "It is further contended that the venue in Will County was not proven and this contention must be sustained. There is no claim that the defendants in the indictment actually entered into any conspiracy in Will County and the VENUE IN THAT COUNTY depends upon the proof of the commission of an overt act." In *People vs. Fisher* 51 Cal. 320 the Court holds: "The point is made that it is not proven that the alleged offense was committed in the County of San Joaquin. Upon a careful examination of the Bill of Exceptions we find no evidence to PROVE THE VENUE. Case reversed." Hundreds of cases might be cited to the Court holding this to be the general rule of law practically without exception.

The writer will close his citation of authorities on the question of the necessity of *laying the venue and proving it as laid* by citing a case which his opponents will not question. The case we have in mind is one decided by the Supreme Court of the State of South Dakota. *State v. Crowley* 108 N. W. 491, where it is said: "*That the venue is a matter of fact which must be proved as laid in the indictment or information, is too elementary to justify the citation of supporting authorities.*"

Let the allegation in the information which is before the Court and the whole record be measured by these accepted principles of law and we are certain that the United States District Court will be fully affirmed in its statement when it said:

"It follows from the foregoing that the information challenged in the State Court and here, stands condemned by statute and is insufficient. Being insufficient it cannot sustain a judgment and all proceedings tending thereto are void . . . there is *no evidence* that the alleged offense was committed any place *within the jurisdiction* of the Trial Court and such failure of proof could have been adjudged sufficient to oust the State Court of jurisdiction, even if the information had contained proper jurisdictional averments."

The Court will keep in mind that the only charge in the Information in connection with the presentation of the "Proof of Loss" is that Appellee "did wilfully, unlawfully, and feloniously present and caused to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents of the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof of loss in support of such claim."

We submit that the only fair and reasonable interpretation that can be given to this language is that the presentation if made at all was made at Newark, New Jersey. The Trial Judge of the United States Court, whose opinion is set out in full in this brief, at the conclusion of this booklet, on this question, said: "A reasonable inference would be that such claim or proofs were presented to the Company at Newark, New Jersey. This would be the more reasonable inference, absent an allegation that the defendants were located in South Dakota, even with such an allegation as to the residence of the agent, under this statute, the information should have charged that the presentation of the false and fraudulent claim and proofs in support thereof were made somewhere within the jurisdiction of the Court."

It appears clearly and without dispute from the record before the Court that the defendant made and placed of record proper and strenuous objections at a proper time to the *form of the information* and to the *introduction of any testimony thereunder* and for an *advised verdict* on the grounds, among others: 1. *That no offense was charged in the information, no venue being laid.* 2. *That the Court was without jurisdiction all the way through because the state failed to prove the alleged offense within*

*the jurisdiction of the Court or anywhere else in the state of South Dakota or in the United States. Record page 27, 28.*

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### HABEAS CORPUS PROPER REMEDY IN THE CASE AT BAR.

The writer concedes that *habeas corpus* may not be invoked to review irregularities or erroneous rulings or mistakes of judgment by a Trial Court however serious these may be. In other words, the writ of *habeas corpus* may *not be used as a substitute for the writ of error* or instead of it.

The writer insists that where the Trial Court was *without jurisdiction*, as in the case at bar, either at the beginning of the trial or having had *jurisdiction* at the beginning *lost it during the proceedings* in any of the ways provided by law, *that the only real remedy is by habeas corpus.*

A judgment by a Court without jurisdiction is a pure nullity. It is void *Ab Initio Et Ad Finitem*, from the beginning and to the end.

In the case at bar *habeas corpus* was and is the *only remedy* open to the defendant. He *could not* sue out a writ of error to this Court from the South Dakota Court under the record in this case.

Because "error" means an honest mistake of judgment and in a Court proceedings it means an honest mistake by a Court that had jurisdiction to pass upon some question either of fact or of law.

A Court without jurisdiction *does not make errors, its rulings are not erroneous.* They are a pure nullity without any force or effect. *They are as if they never were.* The learned Trial Court in discussing this question in his very scholarly and complete opinion, which appears at the conclusion of this booklet said: "It is idle to say that petitioner should be required to seek a review of the proceeding in the state court by writ of error upon a record that obviously could not sustain a judgment of conviction. Moreover, in pursuing its inquiry, the court is warranted in examining all matters that go to the authority

of the court to try and sentence the accused. (*Harlan v. McGourin*, 218 U. S. 442; *Moore v. Dempsey*, *Supra.*)”

Had the appellee come to this Court with a writ of error this Court could and probably would have summarily *dismissed the writ* on the ground that the *whole proceedings in the Courts of South Dakota were not erroneous but void*. There is no way known to the books whereby a Court wholly without jurisdiction can render a valid judgment or deprive one of his liberty. Nor can it commit an error in a legal sense. It can do nothing.

The mere statement of the facts is a sufficient answer to why *habeas corpus* and not *writ of error* was the proper and only remedy for the petitioner when he went into the United States Court.

“If the Court below was without jurisdiction of the matter upon which the judgment of imprisonment was rendered, or if it exceeded its jurisdiction in the extent of the imprisonment imposed this Court will interfere and discharge the petitioner *on habeas corpus*.” *Justice Field Ex Parte Siebold* 100 U. S. 371.

“It is firmly established that if the Court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional or for any other reason, the judgment is void and may be questioned collaterally and the defendant who is imprisoned under and by virtue of it may be discharged from custody *on habeas corpus*.” *Ex Parte Nielsen* 131 U. S. 184; *Ex Parte Snow* 120 U. S. 274; *Ex Parte Royal* 117 U. S. 241.

Like decisions with like holdings appear frequently in the books but to the writer it seems unnecessary to call this Court’s attention to any further authorities on the propositions which he has thus far laid down.

#### DUTY OF UNITED STATES COURTS TO INVESTIGATE QUESTIONS.

“In *Castle v. Lewis*, 254 Fed. 915, l. c. 919 and 920, Judge Sanborn, in a learned and exhaustive opinion, said among other things,—“When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in

custody in violation of the Constitution, or of a law or treaty of the United States, or (b) for an act done or omitted to be done by him in pursuance of a law of the United

States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States . . ."

In a very learned and strikingly strong opinion by Mr. Justice Holmes, of this court, in *Moore vs. Dempsey* delivered on February 19th, 1923, there appears the following language touching the point we now have in mind: "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself, which, if true as alleged, make the trial absolutely void."

It is true that Mr. Justice McReynolds wrote a dissenting opinion in that case, in which Mr. Justice Sutherland concurred. But these learned gentlemen did not dissent on the fundamental proposition, that if the Trial Court is without jurisdiction its proceedings are wholly null and void, and that *habeas corpus* is the proper remedy.

In *Ex Parte Van Moore*, 221 Fed. 968, and in *Yohyowan v. Luce*, 291 Fed. 425, the Federal Court interfered by writ of habeas corpus upon the theory that the state court was wholly without jurisdiction. It is true that those cases were cognizable only in the Federal Court but the proceeding as here was based upon the lack of jurisdiction of the state court."

Nowhere in the books can there be found a decision which will deny the right of a United States Court to intervene where a citizen of the country is deprived of his rights under the Constitution and laws of the land through the proceedings of a Court that is without jurisdiction. With the embodiment of the opinion and judgment of the United States District Court which follows, the writer will cite no other authorities or make no further argument.

## V. THE OPINION AND JUDGMENT OF THE TRIAL COURT.

"Habeas corpus. Petitioner seeks his discharge from the custody of the respondent, as Sheriff of Minnehaha County, South Dakota. He is under restraint in virtue of a mittimus in the hands of the Sheriff. This instrument was issued out of the Circuit Court of said Minnehaha County and is based upon a judgment of conviction in said Circuit Court, which judgment, petitioner claims, is a nullity.

"On the 3rd day of April, 1922, petitioner was placed on trial in said Court upon an information filed by the Prosecuting Attorney of said county and based upon Section 4271 Rev. Code 1919, of South Dakota, in part as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss . . . is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding \$1000 or both."

"The pertinent allegations of said information are as follows:

### "INFORMATION.

State of South Dakota, County of Minnehaha, ss.

In the Circuit Court thereof, Second Judicial Circuit, May Term, A. D. 1920.

The State of South Dakota vs. George W. Egan, Defendant. Information for the crime of presenting false claim and proof of loss.

L. E. Waggoner, State's Attorney of the County of Minnehaha in the Second Judicial Circuit of the State of South Dakota, upon his oath informs the Court:

That the Firemen's Insurance Company of Newark, New Jersey, was at all of the time herein mentioned, a corporation, . . . engaged in the business of insuring property against accidental loss by fire . . . had fully complied with the laws of the State of South Dakota . . . was authorized to do a fire insurance business in

the State of South Dakota . . . and on the 6th day of September, 1919, issued to said George W. Egan its policy of insurance . . . by the terms of which a two and one-half story frame building located on Tracts Four (4) and Five (5) . . . of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township One Hundred One (101), Range Forty-nine (49), Minnehaha County, South Dakota, was insured in the amount of Twenty-five Hundred Dollars (\$2500), for the term of one year from and after September 6, 1919, and thereafter . . . on or about November 24, 1919, the said property . . . was consumed and with the exception of the foundation, completely destroyed by fire . . .

And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim . . . wherein and whereby the said defendant represented and claimed that said building . . . had been completely destroyed by fire on the 24th of November, 1919; that the cause of said fire was unknown; that said building was occupied as a residence and summer home; that the value of said building was \$30,000; . . .

Whereas, in truth and in fact, each and all of the said statements in said proof of claim were false and fraudulent, and known to be false and fraudulent by the said defendant at the time they were made, in this: . . . the cause of the said fire was at the time known to the said George W. Egan, in that he had caused and procured said fire to be set and started for the purpose and with the intent of destroying said building; and the said George W. Egan had never occupied the said building as a home or summer residence; nor had the said building ever been occupied as a home or summer residence by anybody during the time when the said policy of insurance was in force . . . ; and

Whereas, in truth and in fact, the said building was

not of the value of Thirty Thousand Dollars (\$30,000) . . . all of which said false and fraudulent claims and proof of loss were made with the intent upon the part of the said George W. Egan to present and use the same in support of the said George W. Egan's claims against the said Firemen's Insurance Company, and the said defendant did thereby and by said means, commit the crime of presenting a false claim and proof of loss upon a contract of insurance contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

"At the beginning of the trial, petitioner asked permission to withdraw his plea of Not Guilty, previously entered, for the purpose of formally demurring to the information. The request was denied, whereupon the petitioner objected "to the introduction of any testimony under the information in this case, because, . . .

3rd,—That said information does not describe a public offense, that no venue is laid and that the Court is without jurisdiction in this case under the information filed herein.

5th,—That the County in which the alleged offense is alleged to have been committed is not stated in said information, and that said information is defective in failing to lay the venue in order to give the Court jurisdiction in the premises."

"This objection was overruled and at the close of the State's evidence, petitioner again challenged the jurisdiction of the Court, adding thereto the further ground that there was a total failure of proof as to the venue of the alleged offense. Again he lost his contention and upon conviction vigorously renewed and stoutly urged his challenge to the jurisdiction of the court in his motion in arrest of judgment and in the Supreme Court on appeal. His contention availed him nothing and having exhausted all his remedies in the State courts, he has resorted to this Court, claiming an infringement of and trespass upon his rights as a citizen, which rights are vouchsafed in Section 1, Article 14, of the Amendments to the National

Constitution, wherein it is provided that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

"Other relevant facts will be stated in the course of the opinion.

### MEMORANDUM OPINION

"1. As a postulate to the consideration of this case, it should be noted that in habeas corpus proceedings, as here, the whole inquiry is limited to an examination of fundamental and jurisdictional questions, as the habeas corpus writ cannot be employed as a substitute for a writ of error. (*Ex parte Parks*, 93 U. S. 18; *Harlan v. McGourin*, 218 U. S. 442, l. c. 448; *Collins v. Johnston*, 237 U. S. 502; l. c. 505; *Bens v. U. S.* 266 Fed. 152; *Murray v. U. S.* 273 Fed. 522; *Collins v. Morgan*, 243 Fed. 495; *Biddle v. Luvisch*, 287 Fed. 699; *Ex parte Salinger*, 288 Fed. 752, l. c. 754; *Ex parte, Joly*, 290 Fed. 858.)

"While upon habeas corpus the inquiry only extends to the power and authority of the court to act, not the correctness of its conclusions, yet in ascertaining a jurisdictional fact and whether the judgment is wholly void, the court will pursue its inquiry through the record of the proceedings.

It was said in *Moore v. Dempsey*, 261 U. S. 86, l. c. 92,—

"It does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void."

2. By Section 4725 of the Revised Code of 1919 of South Dakota, it is provided that an "information is sufficient if it can be understood therefrom . . .

"4. That the offense charged was committed within the jurisdiction of the court, or though without the jurisdiction of the court, is triable therein."

"Obviously, the information, being considered, does not meet the test of sufficiency prescribed by this statute. It cannot be sustained upon the most favorable inferences. It charges in substance that the Firemen's Insurance Company, a corporation of Newark, New Jersey, was em-

powered to do business in the State of South Dakota, and in pursuance of its authority insured certain property of the petitioner, located in Minnehaha County; that the property was destroyed by fire and that thereafter petitioner presented a false claim to its agents. It is not alleged where petitioner presented the false and fraudulent claim and proofs in support thereof.

"A reasonable inference would be that such claim and proofs were presented to the Company at Newark, New Jersey. This would be the more reasonable inference, absent an allegation that the agents of the Company were located in South Dakota, and moreover, even with such an allegation as to the residence of the agents, under this statute, the information should have charged that the presentation of the false and fraudulent claim and proofs in support thereof were made somewhere within the jurisdiction of the court, or an allegation as provided by the statute 'though without the jurisdiction of the court, is triable therein.'

"Though by Section 4715 South Dakota Revised Code 1919, all technical forms of pleading in criminal actions have been abolished, yet the lawmakers plainly and unequivocally provided that an information to be sufficient must yield the inference that the offense was committed within the jurisdiction of the court. This is the equivalent of an allegation that the indictment or information must affirmatively show the jurisdiction of the court.

"Apart from the jurisdictional question, the place of the alleged offense should be charged with such clearness and certainty as to afford full notice of the charge and thereby enable the accused to make his defense with reasonable knowledge and to plead the judgment rendered upon the information in bar of any second charge for the same offense. It is a general principle of the law that the place must be alleged with such certainty that it may be seen that the court has jurisdiction of the offense. This is the rule reinforced by Section 4725 of South Dakota's laws.

"It follows from the foregoing that the information, challenged in the State Court and here, stands condemned by statute and is <sup>^</sup>sufficient. Being insufficient, it cannot

sustain a judgment and all proceedings tending thereto are void.

"3. It is the contention of the learned Attorney General, who appears for the respondent, that even if the information did not contain proper jurisdictional averments, yet all questions thereon were foreclosed against the petitioner by his failure to file a formal demurrer. The Court cannot so hold.

"It is provided by Section 4771 South Dakota Revised Code of 1919, that the defendant may demur to an information when it appears upon the face thereof, among other things, 'that the court is without jurisdiction of the offense charged.'

"By Section 4779 South Dakota Revised Code 1919, it is provided that objections, under said Section 4771, can only be taken by demurrer *'except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that it does not describe a public offense may be taken at the trial under the plea of not guilty and in arrest of judgment.'*

"From the above, it is very evident that the lawmakers had in mind the fundamental proposition that jurisdiction cannot be conferred by consent, agreement or waiver, and that therefore a challenge to the jurisdiction of the court could be made at any stage of the proceeding and in any manner.

"An examination of the proceedings in this case, however, discloses that the inferences of the respondent are not justified, nor are the conclusions of the Supreme Court in this regard sustained. At the very threshold of the trial, petitioner requested permission to withdraw his plea of Not Guilty for the purpose of filing a formal demurrer. This request, having been denied him, he thereupon interposed his challenge to the jurisdiction of the court, and thereafter urged his contention with vigor and persistency at every state of the proceeding.

"It does not appear upon the record that petitioner, by his conduct at the trial, waived even his personal rights or that he was estopped from asserting them, either in the state courts or here.

"4. In view of the above, it is not necessary to notice

the contention made in this court that the statute under which petitioner was convicted had been repealed by what is known as the Valued Policy Law. In passing, however, and in view of the analysis of the two provisions made by counsel, it should be observed that the Valued Policy Law is conclusive only as to the amount written in the policy where the property is wholly destroyed 'without criminal fault on the part of the insured.'

"Section 4271 is leveled against the presentation of a false or fraudulent claim or any proof in support thereof. It would appear from these provisions that the presentation of a false or fraudulent claim or proof in support thereof might lay the foundation for a successful prosecution, notwithstanding the Valued Policy Law. As an illustration, a claim might be presented for the amount specified in the policy where the insured property had not in fact been destroyed at all, or where it is not wholly destroyed by fire, or it could be made the basis of a prosecution where the property had been destroyed by the 'criminal fault on the part of the insured.'

"5. It is finally contended by the respondent that this court should not interfere by habeas corpus but that the petitioner should pursue his remedy by writ of error to the Supreme Court of the United States. This contention would be correct if the state court had jurisdiction of the cause and merely abused the processes of the court and committed irregularities but where, as here, the state court was without jurisdiction to proceed in the premises, its judgment was void and being a nullity, it was subject at any time to collateral attack. The Federal Courts are clothed by statute with power to issue writs of habeas corpus 'for the purpose of an inquiry into the cause of restraint of liberty,' and 'shall proceed in a summary way to determine the facts in the case by weighing the testimony and arguments and thereupon to dispose of the party as law and justice require.'

"It is idle to say that petitioner should be required to seek a review of the proceeding in the state court by writ of error upon a record that obviously could not sustain a judgment of conviction. Moreover, in pursuing its inquiry, the court is warranted in examining all matters that go to the authority of the court to try and sentence the

accused. (*Harlan v. McGourin*, 218 U. S. 442; *Moore v. Dempsey*, *Supra.*)

"In *ex parte Van Moore*, 221 Fed. 968, and in *Yohyowan v. Luce*, 291 Fed. 425, the Federal Court interfered by writ of habeas corpus upon the theory that the state court was wholly without jurisdiction. It is true that those cases were cognizable only in the Federal Court but the proceeding as here was based upon the lack of jurisdiction of the state court.

"In *Castle v. Lewis*, 254 Fed. 915, l. c. 919 and 920, Judge Sanborn, in a learned and exhaustive opinion, said, among other things,—

"When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in custody in violation of the Constitution, or of a law or treaty of the United States, or (b) for an act done or omitted to be done by him in pursuance of a law of the United States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States . . . "

"In conclusion it should be stated that it was the right and duty of this court to make inquiry into the question of proof of venue in the trial of petitioner and this was done.

"There was no evidence that the alleged offense was committed at any place within the jurisdiction of the trial court and such failure of proof could have been adjudged sufficient to oust the state court of jurisdiction, even if the information had contained proper jurisdictional averments.

"In view of the premises, it is the order of the court that the petitioner be discharged from the custody of the Sheriff of Minnehaha County, South Dakota, and that his

bond heretofore taken, pending this proceeding, be exonerated and the sureties discharged.

"Kansas City, Missouri, April 1st, 1924.

"ALBERT L. REEVES,

"United States District Judge."

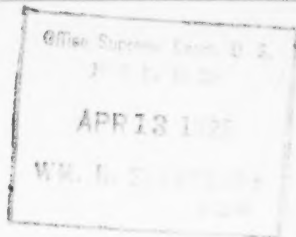
The above and foregoing from the pen of the learned United States District Judge appellee makes a part of his brief and argument and offers the same to this Court as such.

The writer should call the attention of this Court to the fact that its rule required the appellant to serve his brief and argument on appellee at least three weeks before the case was assigned for final hearing in this Court, which was definitely stated as April 13th, 1925. Those opposing appellee served no brief or argument until on the afternoon of March 30th, 1925, which was just two weeks before the day set for final hearing before this Court. It was therefore necessary in order that appellee might comply with the rules of this Court by having his brief and argument on file one week before April 13th, 1925, that he should have the same printed and with the Clerk in Washington not later than the morning of April 6th, 1925. It takes at least forty-eight hours to deliver a package from Sioux Falls, South Dakota, into the hands of the Clerk of this Court. So it will readily appear that appellee has been placed at a great disadvantage in the preparation and presentation of his brief and argument not having had the advantage of a perusal of the showing of those opposed to him. These facts, the writer is certain, will be properly considered by this Court. Appellee is very much of the opinion under the rules of this Court the brief of his opponents should be stricken by the Court.

On the whole Record, under the well settled law and for reasons assigned I am certain that this appeal should and will be dismissed and the Opinion and Judgment of Judge Albert L. Reeves, affirmed.

Respectfully submitted,

GEO. W. EGAN, *Pro Se Se.*



**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1924.**

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**No. 622**

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VINCENT L. KNEWEL, AS SHERIFF OF MINNEHAHA  
COUNTY, SOUTH DAKOTA, APPELLANT,

*vs.*

GEORGE W. EGAN.

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**MOTION BY APPELLEE TO DISMISS THE APPEAL  
AND TO STRIKE BRIEF OF APPELLANT, ETC.**

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GEORGE W. EGAN,  
*Counsel pro Se.*

THE STATE OF NEW YORK  
IN SENATE  
January 1, 1901.

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1899.  
AND  
A REPORT OF THE COMMISSIONER OF THE LAND OFFICE  
ON THE PROGRESS OF THE LAND OFFICE  
DURING THE YEAR 1900.

ALBANY: W. H. BROWN, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

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**No. 622**

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VINCENT L. KNEWEL, APPELLANT,

*vs.*

GEO. W. EGAN, APPELLEE.

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**Affidavit of Geo. W. Egan.**

STATE OF SOUTH DAKOTA,

*County of Minnehaha, ss:*

Geo. W. Egan, first being duly sworn, states that a copy of the within Motion, together with a copy of the Affidavit of Vincent L. Knewel, and the Affidavit of Geo. W. Egan, was by him this day enclosed in an envelope, properly stamped, properly addressed to B. S. Payne, Pierre, South Dakota, and sent by registered mail to him, registry receipt pasted hereto as a part hereof.

GEO. W. EGAN.

Subscribed and sworn to before me this 7th day of April,  
1925.

[SEAL.]

OLIVE L. GEIGER,  
*Notary Public.*

My commission expires Nov. 14, 1928.

[Attached to sheet of copy was Post Office return receipt dated April 7, 1925, numbered 18873 showing registry of mailing, also Return Card showing receipt, 18873, by Byron S. Payne, by Gertrude Bedesse to be returned to Geo. W. Egan, Sioux Falls, S. Dak., dated April 8, stamped Pierre, S. Dak.—Printer.]

IN THE  
SUPREME COURT OF THE UNITED STATES.

Case No. 622.

VINCENT L. KNEWEL, *Appellant*,

*vs.*

GEO. W. EGAN, *Appellee*.

**Motion by Appellee, Geo. W. Egan.**

Comes now Geo. W. Egan, appellee herein, and respectfully moves this Court for the following affirmative relief:

1. For an order striking the brief and argument filed by B. F. Jones, B. S. Payne, *et al.*, claiming to be in behalf of the appellant, Vincent L. Knewel, because they do not appear for him and have no authority to prepare or present any brief or make any appearance for said appellant Knewel.

2. For an order dismissing this appeal for the reason that the appellant is not represented and appellant, Vincent L. Knewel, disclaimed in writing any interest in the appeal in the form of a written motion which was served on appellee on December 15, 1924.

3. For an order that appellee may have his costs and disbursements. Reference in this motion being to the original motion of Vincent L. Knewel lodged with the Clerk of this Court for filing on December 31, 1924, and to the affidavits of Vincent L. Knewel and Geo. W. Egan, attached to this motion and made a part hereof.

GEO. W. EGAN,

*Attorney pro Se Se.*

IN THE  
SUPREME COURT OF THE UNITED STATES.

Case No. 622.

VINCENT L. KNEWEL, *Appellant*,

*vs.*

GEO. W. EGAN, *Appellee*.

**Affidavit of Vincent L. Knewel.**

STATE OF SOUTH DAKOTA,

*County of Minnehaha, ss:*

Vincent L. Knewel, first being duly and solemnly sworn on his oath, states that he is the same Vincent L. Knewel who appears as appellant in Knewel *vs.* Egan, now pending in the Supreme Court of the United States; that when the writ in the *habeas corpus* case was served on him on December 1, 1924, that on the 3d day of December following he communicated with Hugh S. Gamble, State's Attorney of Minnehaha County, and asked Mr. Gamble to represent him in the *habeas corpus* hearing; that he never at any time employed or engaged any other attorney than said Hugh S. Gamble; that B. L. Jones and B. S. Payne, of the Attorney General's office, came into the case without affiant's knowledge or consent; that they took charge of the case for affiant without any request on affiant's part and practically crowded affiant's attorney out of the case; that affiant did not want to

appeal this case after he had read the opinion of Judge Albert L. Reeves, of Kansas City. The opinion seemed right to affiant, but B. F. Jones and B. S. Payne told affiant that they were going to appeal and could appeal without him, and because of that they induced appellant to appeal the case; that later affiant took counsel with the most competent lawyers he could get and was advised by them that Judge Reeves had stated the law. Affiant then thought that any appeal would only be to harass and persecute Egan and he did not want to be a party to any such proceeding, because he knew that B. F. Jones and B. S. Payne were personally unfriendly to Egan. That as soon as affiant received a statement from the Clerk of the United States Court as to the amount of costs due to Egan as a result of the trial before Judge Reeves, affiant paid the costs to Egan. Affiant had his attorneys prepare a motion for him to dismiss this case in the United States Court. He served the motion on Egan and then sent the motion with a personal letter to the Clerk of the United States Court at Washington, asking him to file the same and call the Court's attention to the motion. Affiant still wants this case dismissed. There are no lawyers appearing for appellant in the Supreme Court with his consent or at his request. Affiant has learned by hearsay that B. F. Jones and B. S. Payne, or somebody acting for them, have filed a motion to substitute George Boardman as appellant instead of this affiant. Affiant has received no notice of any such motion and knows nothing about it; is not a party to it and does not authorize it. Affiant has also learned by hearsay that the same parties have filed a motion for the State of South Dakota to intervene in this case, but affiant has received no notice of any

such proceeding and knows nothing about it; does not consent to it, and specifically objects and opposes the substitution of George Boardman or the intervention of the State of South Dakota, and requests that this case be dismissed on his motion.

VINCENT L. KNEWEL.

Subscribed and sworn to before me this 10th day of March, 1925.

[SEAL.]

N. O. MONSERUD,

*Notary Public.*

STATE OF SOUTH DAKOTA,

*County of Minnehaha, ss:*

Geo. W. Egan, first being duly sworn on his oath, states that he is appellee in the case entitled Knewel *vs.* Egan, in the United States Supreme Court; that on this 30th day of March, 1925, he received through the mail from B. S. Payne, at Pierre, South Dakota, a copy of "Brief for Appellant"; that this case has been assigned for hearing on April 13, 1925, for several months; that there is but two weeks between this date and the date of the hearing on said case; that the rules prescribe that appellee shall have served upon him or his counsel copy of appellant's brief three weeks before the hearing; that this brief should be stricken from the files as being in violation of the rules of this Court.

That this case should be dismissed on appellee's motion because the real and only appellant, Knewel, served on Appellee on December 15, 1924, his Motion to dismiss the same, and as affiant believes and is creditably informed, said Motion

was lodged with the Clerk of the Supreme Court at Washington on December 31, 1924.

That when the costs in the United States District Court were taxed by its Clerk, Jerry Carleton, of Sioux Falls, in favor of appellee, Knewel, appellant, personally paid said costs to this appellee; that the State of South Dakota or the County of Minnehaha did not pay these costs or anything else so far as this affiant knows; that the State of South Dakota did not seek to intervene at the trial in this case nor was any Order of Intervention or Substitution considered by the United States District Court.

GEO. W. EGAN.

Subscribed and sworn to before me this 30th day of March, 1925.

[SEAL.]

OLIVE L. GEIGER,

*Notary Public.*

My commission expires Nov. 14, 1928.

[Endorsed:] File No. 30,587. Supreme Court U. S., October Term, 1924. Term No. 622. Vincent L. Knewel, as Sheriff, etc., Appellant, *vs.* Geo. W. Egan. Motion by appellee to dismiss the appeal and to strike brief of appellant, etc., with notice and affidavit of service. Filed April 13, 1925.

(6136)



KNEWEL, SHERIFF *v.* EGAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF SOUTH DAKOTA.

No. 622. Argued April 20, 1925.—Decided May 25, 1925.

1. A sentence of a state court in a criminal case can not be reviewed by *habeas corpus* in the federal court upon the ground that the information was insufficient as a pleading. P. 445.
2. Nor upon the ground that the information failed to allege venue, and that the state court denied the relator a constitutional right by holding the defect to have been waived under a state statute by failure to demur. P. 446.
3. Where a sheriff appealed to this court from a judgment of the District Court in *habeas corpus* discharging a state prisoner from his custody, and after going out of office, in collusion with the prisoner, moved a dismissal of the appeal—*Held* that the motion should be denied, and that motions of the sheriff's successor to be substituted and of the State to intervene should be granted. P. 447.

298 Fed. 784, reversed.

APPEAL from a judgment of the District Court in *habeas corpus*, discharging the appellee from custody of the appellant as sheriff.

*Mr. Byron S. Payne*, with whom *Messrs. Buell F. Jones*, Attorney General of South Dakota, *J. D. Coon* and *Samuel Herrick* were on the brief, for appellant.

*Mr. George W. Egan*, pro se.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on appeal from the District Court of the United States for the District of South Dakota from

an order and judgment of that court on writ of *habeas corpus*, discharging the appellee from the custody of the appellant as sheriff of Minnehaha County, South Dakota.

Appellee was charged, on information by the state's attorney of that county, with the presentation of a false insurance claim in violation of § 4271 of the Revised Code of 1919 of South Dakota. He was convicted of violation of the statute, after trial by jury, in the South Dakota Circuit Court in May, 1920, and was sentenced to serve a term in the state penitentiary. On appeal to the Supreme Court of the State, judgment of conviction was vacated and new trial granted. *State v. Egan*, 44 S. D. 273.

Egan was again brought to trial on the same charge in April, 1922, and was again found guilty, and sentenced to serve a term in the state penitentiary. Upon appeal to the Supreme Court of the State, the judgment of conviction was affirmed. *State v. Egan*, 195 N. W. 642.

Before the District Court, the appellee urged, as he urges here, two principal grounds for granting the writ, namely, that the information on which the conviction was had did not describe a public offense; that in it no venue was laid and that in consequence the trial court was without jurisdiction in the cause.

Section 4271 of the Revised Code of South Dakota, under which the conviction was had, so far as pertinent, reads as follows:

"Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, . . . is punishable by imprisonment in the state penitentiary not exceeding three years, or by fine not exceeding one thousand dollars, or both."

The information charged in substance that the Firemen's Insurance Company, a corporation of Newark, New Jersey, was empowered to do business in the State of South

Dakota and in pursuance of this authority insured certain property of petitioner located in Minnehaha County; that the property was destroyed by fire and that thereafter petitioner presented a false claim to its agents; the language of the information being "and that thereafter and on or about the 9th day of January, 1920, the said defendant, George W. Egan then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Co., who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim."

The Circuit Court of Minnehaha County, in which appellee's trial and conviction were had, by the provisions of the Constitution of South Dakota (§ 14, Article 5) and the Revised Code of South Dakota, 1919, § 4653, is given original jurisdiction of all actions and causes both at law and in equity and original jurisdiction to try and determine all cases of felony. It accordingly had plenary jurisdiction to try the charge of violation of § 3271 of the Revised Code which makes the presentation of false or fraudulent insurance claims a crime punishable by imprisonment in the state penitentiary, which, by § 3573 is made a felony. The Circuit Court is not limited in its jurisdiction by the statutes of the State to any particular county. Its jurisdiction extends as far as the statute law extends in its application; namely throughout the limits of the State. The only limitation in this regard, contained in the statute, is found in § 4654 which provides in substance that the issue of fact in any criminal case can only be tried in the court in which it is brought, or to which the place of trial is changed by order of the court.

Section 4771 provides that defendant may demur to the information when it appears upon its face "that the court is without jurisdiction of the offense charged." Section 4779 provides that objections to which demurrers may be

interposed under § 4771 are waived, with certain exceptions not here material, unless taken by demurrer.

Appellee pleaded "not guilty" to the indictment. His application, made later, to withdraw the plea and demur was denied, the court acting within its discretionary power. *State v. Egan*, 195 N. W. 642. The Supreme Court of South Dakota, in sustaining the verdict and upholding the conviction held that the information sufficiently charged a public offense under § 4271, 44 S. D. 273, and it also held that the objection to the failure to state the venue in the information was waived by the failure to demur. From the foregoing it will be observed that what appellee is really seeking on this appeal is a review on *habeas corpus* of the determination of the Supreme Court of South Dakota that the information was sufficient as a pleading and a determination that the decision of the state court holding that under the Revised Code of 1919 (§§ 4725, 4771, 4779) the appellee waived the objection that the information did not state the venue by not demurring, was a denial of his constitutional rights which can be reviewed on *habeas corpus*.

It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged. *Andrews v. Swarz*, 156 U. S. 272; *Bergemann v. Backer*, 157 U. S. 655; *In re Lennon*, 166 U. S. 548; *Felts v. Murphy*, 201 U. S. 123; *Valentina v. Mercer*, 201 U. S. 131; *Frank v. Mangum*, 237 U. S. 309.

A person convicted of crime by a judgment of a state court may secure the review of that judgment by the highest state court and if unsuccessful there may then resort to this Court by writ of error if an appropriate federal question be involved and decided against him; or, if he be imprisoned under the judgment, he may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction.

See *Ex parte Royall*, 117 U. S. 241. But if he pursues the latter remedy, he may not use it as a substitute for a writ of error. *Ex parte Parks*, 93 U. S. 18; *In re Coy*, 127 U. S. 731. It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings. *Ex parte Watkins*, 3 Peters 193; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Parks*, *supra*; *In re Coy*, *supra*; *Bergemann v. Backer*, *supra*; *Howard v. Fleming*, 191 U. S. 126; *Dimmick v. Tompkins*, 194 U. S. 540; *In re Eckart*, 166 U. S. 481; *Goto v. Lane*, 265 U. S. 393.

Appellee stands in no better situation with respect to the failure to allege venue in the information. A mere failure to allege venue and thus to show affirmatively that the crime was committed within the territorial jurisdiction of the court, does not deprive the court of jurisdiction over the cause and the sufficiency of the indictment cannot be called in question upon *habeas corpus*. Even though an indictment thus drawn might have been found defective upon demurrer or writ of error, it is not so fatal, upon its face, as to be open to collateral attack after trial and conviction. *United States v. Pridgeon*, 153 U. S. 48, p. 59; and see *State v. Egan*, 44 S. D. 273, 277.

Moreover, as this case was conducted in the state court, the ultimate question presented is whether the procedure established by the statutes of South Dakota providing that failure to allege venue in the information is waived, unless demurred to, is a denial of a constitutional right. With respect to that question, we hold, as

this Court has repeatedly held, that the judgment of state courts in criminal cases will not be reviewed on *habeas corpus* merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted. The proper remedy is by writ of error. *Markuson v. Boucher*, 175 U. S. 184. And see *Baker v. Grice*, 169 U. S. 284, and *Tinsley v. Anderson*, 171 U. S. 101, 104. See also, with respect to review, on *habeas corpus*, of judgments of United States District Courts, *Riddle v. Dyche*, 262 U. S. 333, and *Craig v. Hecht*, 263 U. S. 255. The judgment of the District Court was without warrant under the decisions of this Court and must be reversed.

The appeal in this case was applied for by counsel for the appellant; an assignment of errors was filed and the appeal was allowed conditional upon filing the usual appeal bond. The bond was executed by appellant, and was duly approved and filed.

Later a motion was made to this Court by other counsel appearing for appellant for that purpose, to strike from the record the brief and argument filed on his behalf by the counsel by whom the appeal was taken, on the ground that appellant never authorized the preparation or presentation of any brief in this proceeding, and that he never authorized any attorneys to appear in this Court for him as appellant. Motion has also been made on the same ground by appellee to strike from the record the brief filed in behalf of appellant and to dismiss the appeal. The affidavit of appellant in support of appellee's motion purports to show that the appeal was taken by members of the bar representing the Attorney General of South Dakota, and that the appeal was taken without appellant's unqualified approval, and states that he is satisfied with the decision of the District Court in the premises and that he desires the appeal to be dismissed.

The attorneys who took the appeal have also filed a motion to substitute for the appellant one Boardman, who since the taking of the appeal has been duly elected sheriff in the place of appellant and who consents to the substitution. The State of South Dakota also has filed a motion by its Attorney General appearing by the counsel who took the appeal, to be allowed to intervene on this appeal. All the motions referred to are now pending.

The affidavit of appellant in support of appellee's motion to dismiss discloses an obviously collusive attempt by appellant and appellee to defeat the ends of justice by dismissing the appeal without the consent of any officer representing either the State or the present sheriff, who are the real parties in interest as appellants. Appellant in his affidavit admits that, while he was in office as sheriff, he took the present appeal and he executed the appeal bond. He is therefore in this Court as party appellant; the Court has full jurisdiction of the appeal and it cannot be withdrawn without its consent. The real parties in interest in prosecuting the appeal are the State and the present sheriff, who is a public officer representing the county and the State. The substitution of the sheriff as appellant should be made. (*Thompson v. United States*, 103 U. S. 480, at p. 483) and the State be allowed to intervene.

The motion to dismiss the appeal is denied.

The motions for substitution of the present sheriff for the appellant and for the intervention by the State are granted.

The order of the District Court discharging the appellee from custody is reversed and the case remanded to the District Court with direction to remand him to the custody of the present sheriff.

*Reversed.*